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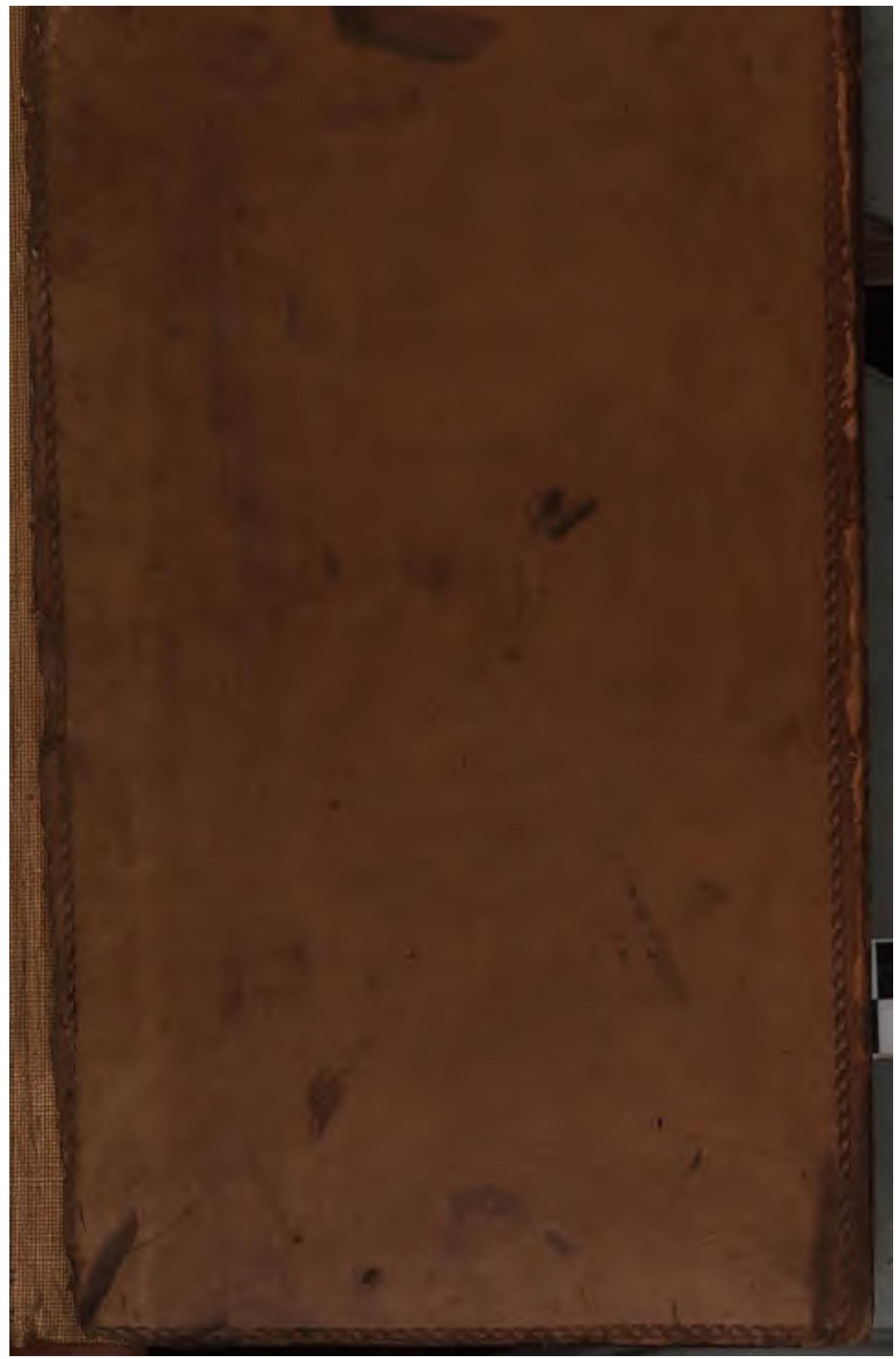
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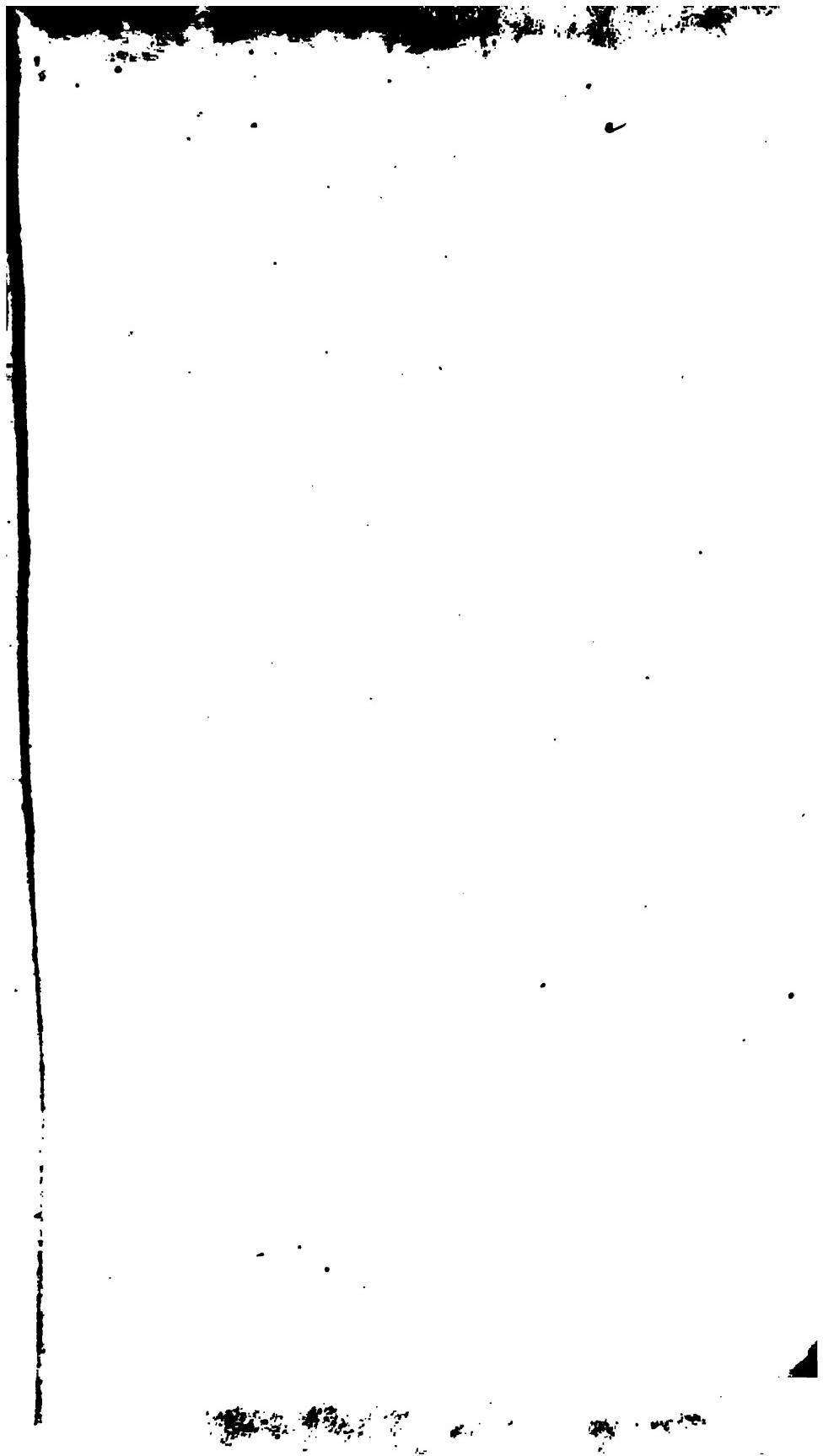
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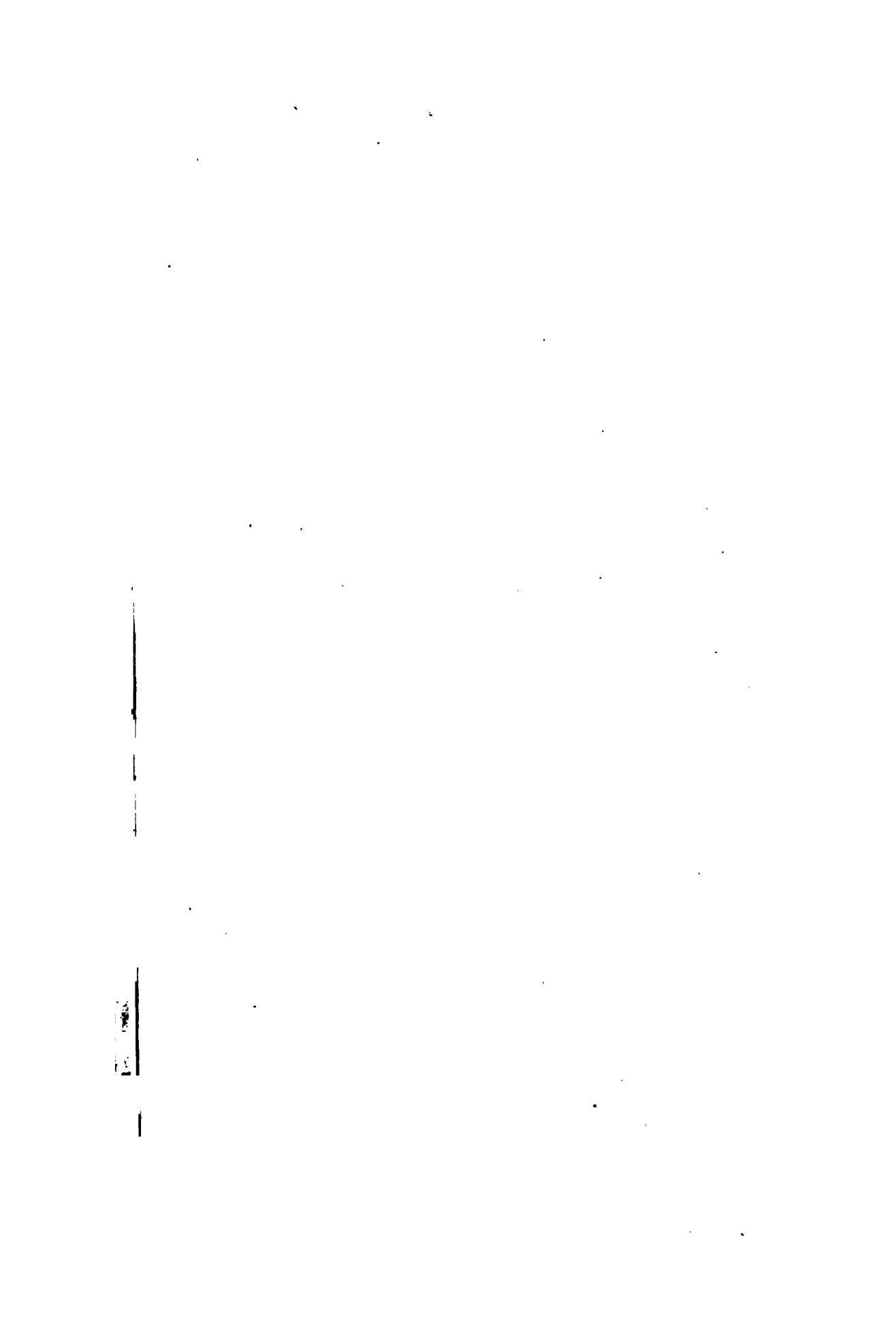
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
THE COURTS OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER,
AND
IN THE HOUSE OF LORDS;
FROM EASTER TERM 36 GEO. III. 1796,
TO TRINITY TERM 39 GEO. III. 1799,
BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

BY JOHN BERNARD BOSANQUET,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW;
AND CHRISTOPHER PULLER,
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

*Ut non difficile sit, quacunque nova causa, consultatione acciderit,
ejus tenere ius.* CIC. DE LEO.

THE SECOND EDITION, CORRECTED.

IN THREE VOLUMES.

VOL. I.

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1814.



J U D G E S
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

Right Honourable Sir JAMES EYRE, Knt., Lord Chief Justice.
Honourable Sir FRANCIS BULLER, Bart.
Honourable JOHN HEATH, Esq.
Honourable Sir GILES ROOKE, Knt.

THE REPORTERS having now completed the First Volume of this Work, are anxious to express their gratitude to all those by whom they have been kindly encouraged and assisted in its prosecution. In this acknowledgment they have the satisfaction to include every individual of the Court in which they have been employed, particularly the illustrious person who presided on its bench during the period in which the following cases were decided.

May 3d, 1800.

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IN the long Vacation Sir *John Scott* His Majesty's Attorney General was appointed to succeed the late Lord Chief Justice *EYRE* in this Court, and was created a Peer of *Great Britain* by the title of Baron *ELDON* of *Eldon* in the county Palatine of *Durham*. His Lordship's promotion taking place during the Vacation, the 39 Geo. 3. c. 113. was passed, authorizing His Majesty when a vacancy happens on the Bench during the Vacation, to call any Barrister to the degree of Serjeant, and appoint such person to the Bench. Under this act Lord *ELDON* was called and appointed. The motto on his rings was "*Rege incoluni mens omnibus una.*" On the first day of *Michaelmas* Term His Lordship took his seat in this court and the oaths.

Alan Chambre of Gray's Inn Esquire, was also appointed one of the Barons of the Court of *Exchequer*, on the resignation of Mr. Baron *Perryn*, and was knighted. His promotion, which took place previous to that of Lord *ELDON*, was also during the Vacation, and he was therefore called to the degree of Serjeant, under a particular act passed for that purpose (39 Geo. 3. c. 67.) and gave rings with this motto, "*Majorum instituta tueri.*"

Sir *John Mitford* His Majesty's Solicitor General succeeded Lord *ELDON* as Attorney General.

William Grant Esquire, the Chief Justice of *Chester*, was appointed Solicitor General, and was knighted.

C A S E S

1797.

ARGUED AND DETERMINED

IN

THE COURTS OF COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Thirty-seventh Year of the Reign of GEORGE III.

PIETERS and Another v. LUYTJES.

May 3d.

*L*E BLANC Serjt. moved for a rule to shew cause why the Defendant in this action should not be discharged on entering a common appearance, and all further proceedings be stayed.

The cause of action arose on an instrument dated the 5th Nov. 1794, executed by the Defendant before a notary at *Amsterdam* in *Holland*; whereby he "declared that he was well and truly indebted to the Plaintiffs *merchants of that place*, in a sum of 9190 guilders and 3 stuivers, *Holland's current money*, arising from and out of sundry merchandizes sold and delivered to him on the 30th October 1794, agreeably to the invoice delivered." The affidavit of debt which was made by a third person, stated that the Plaintiff at the time when the said affidavit was made, was *resident at Amsterdam*.

By 34 Geo. 3. c. 9. s. 1. It is enacted, that if any person residing or being in *Great Britain*, shall after the 1st day of March

The Court will not discharge a Defendant on a common appearance under the 34 G. 3. c. 9. s. 7., on the ground of the Plaintiff's residence in *Holland*.

An affidavit to hold to jail made by a third person need not state a connection between the defendant and the Plaintiff.

CASES IN EASTER TERM

1797.

 PIETERS.
 v.
 LUYTJES.

1794, and during the war, knowingly and wilfully pay, send, supply, or deliver, or cause to be paid, sent, supplied, or delivered, either in *Great Britain* or *France*, or in any other country either by payment or remittance of any bill of exchange, note, draft, obligation, or order for money, or in any other manner whatsoever, any money to or for the use of the persons exercising or who shall exercise the powers of government in *France*, or to or for the use of any persons or person who on the 1st day of *January* 1794 were or was or at any time since have or has been, or who at the time of such act done shall be within any of the dominions of *France*, or any county, territory, or place, which was on the said 1st day of *January* 1794, or which shall be, during the said war and at the time of such act done, under the government of the persons exercising or who shall hereafter exercise the powers of government in *France*, every person so offending, being thereof lawfully convicted or attainted, shall be deemed, declared, and adjudged to be a traitor, and shall suffer pains of death, and shall also lose and forfeit as in cases of high treason.

And by section 7th, it is further enacted, that if any action or suit, either in law or equity, shall be commenced or prosecuted for the recovery of any debt or demand, contrary to the provisions of this act, it shall and may be lawful for the Court in which such action or suit shall be commenced, in term time, or any one or more of the judges of such court, out of term, in a summary way to discharge the Defendant or Defendants arrested on mesne process, and to stay all further proceedings in such action or suit, upon such terms as to such Court or Judge respectively shall appear necessary to enforce the provisions of this act.

It was insisted on the part of the Defendant, that *Amsterdam* at the time of the arrest was under the dominion of the persons exercising the powers of government in *France*, and that the Plaintiff being resident there, this was a demand contrary to the provisions of the above act.

Per Curiam. Can we take notice that *Amsterdam* is under the dominion of *France*? The Court will hardly receive evidence of the influence of *France* over *Holland*: actual possession, as of *Flanders*, might bring a case of this kind within the meaning of the act. But in *Holland* there is a government *de facto*, however that government may be influenced by *French* councils (a).—There is no ground for the application.

(a) See the opinion of Blackstone J. in *Rafael v. Verelot.* 2 D. 985.

Le Blanc then objected to the affidavit on which the Defendant was arrested, because it did not state any connection between the deponent and the parties to the suit.

Sed per Curiam. It is not necessary for the connection to appear on the face of the affidavit. The deponent swears positively to the debt, and that is sufficient.

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 PIETERS
v.
LOTTIES.

Rule refused.

TENANT v. ELLIOTT.

ASSUMPSIT for money had and received. Verdict for the Plaintiff.

The Defendant being a broker, effected an insurance for the Plaintiff, a *British* subject, on goods from *Orford* to the *East Indies*, on board the *Koenitz*, an Imperial ship. The ship being lost; the underwriters paid the amount of the insurance to the Defendant, who, without any intimation from them to retain the money, refused to pay it over to the Plaintiff.

Shepherd Serjt. now moved for a rule to shew cause why the verdict in this case should not be set aside and a non-suit entered. By 7 Geo. I. stat. 1. c. 21. s. 2. It is enacted "That all contracts " and agreements whatsoever made or entered into by any of His " Majesty's subjects, or any person or persons in trust for them, " for or upon the loan of any monies by way of bottomry on any " ship or ships in the service of foreigners, and bound or designed " to trade in the *East Indies*, or parts in the said act before " mentioned; and all contracts and agreements whatsoever made " by any of His Majesty's subjects, or any person or persons in " trust for them, for the loading or supplying any such ship or " ships with a cargo or lading of any sort of goods, merchandize, " treasure, or effects, or with any provisions, stores, or necessaries, " shall be and are hereby declared to be void." Now the goods on board the *Koenitz* being the property of the Plaintiff, a subject of *Great Britain*, and the *Koenitz* being a foreign ship, bring this transaction within the provisions of the above act. In *Camden v. Anderson*, 6 Term Rep. 730. it was determined, that a policy effected in contravention of an act of parliament, made for the purpose of protecting the monopoly granted to the *East India Company*, was void. The voyage being illegal, makes the policy illegal also. If then the Plaintiff could not have succeeded in an

May 5th.
8 T.R. 576.
Post, 277. 297.
3 Town. 8.
7 Ves. Jun. 473.

A having received money to the use of *B.* on an illegal contract between *B.* and *C.*, shall not be allowed to set up the illegality of the contract as a defence, in an action brought by *B.* for money had and received.

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action against the underwriters, neither can he recover against the present Defendant. The Defendant is in the nature of a stakeholder: and the Plaintiff's right of action being grounded on his claim against the underwriters, he must now stand precisely in the same situation as if he had immediately sued them.

BULLER J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the Defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over, who is entitled to it but the Plaintiff?

EYRE Ch. J. The Defendant is not like a stakeholder. The question is, Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The Defendant took nothing by his motion. (a)

(a) *Vid. Sullivan v. Greaves. Park, make out his title without shewing the 17/8. but there the Plaintiff could not illegal contract. Farmer v. Russell, pof, 296.*

May 5th.

DYSON v. BIRCH, ONE, &c.

An attorney shall not be allowed his privilege, unless he shew that he has practised within the space of a year.

Qs. If he should not also state that he has had a certificate within that time?

LE BLANC Serjt. moved for a rule to shew cause why the Defendant in this action, who was an attorney of this court, should not be discharged on entering a common appearance.

The Defendant's affidavit stated, that some time before the arrest he purchased a stamp with a view to obtain his certificate, under the 25 Geo. 3. c. 80., but that from particular circumstances (therein mentioned) he was prevented from actually obtaining it till after the arrest.

Le Blanc. The Defendant did every thing that lay within his power, and was entitled to his privilege (if that be affected by the act at all) from the time of paying for the stamp. But in truth the privilege of an attorney does not depend on his certificate: the act in question is a mere regulation of revenue: those who offend against its provisions are subjected to the penalties which it contains; but there is no clause which makes obedience a condition of privilege.

EYRE Ch. J. An application was made to me out of court, which I rejected, because it then appeared, that the Defendant had not practised as an attorney for three years, but that when his circum-

circumstances became embarrassed, he took out a certificate to protect himself.

BULLER J. My Lord very properly rejected this application. There is a rule of court of *Michaelmas Term 1654* (a), that an attorney shall not be allowed his privilege if he has not attended his business for a year. The Defendant therefore should have stated in his affidavit, that he had practised within a year previous to the arrest.

The Court desired that this circumstance might be inquired into, and inserted in an affidavit.

BULLER J. The Defendant may as well also inform the Court, whether he has had a certificate within the year; if not, it will be a strong presumption against him.

This case was never mentioned again. (b)

(a) *Cook's Rules and Orders in C. B.*
(b) In *Rout & Uxor v. Widdell, C. B. Hil. 2 Ann. Lutwyche*, (the last case in the Appendix,) where an attorney pleaded his privilege, it was urged, that in the precedents in *Reffel*, where attorneys of *C. B.* brought *habeas corpus*, to discharge themselves from arrest by process out of inferior courts, their privilege was recited to be *dum aliqua negotia in codem banco prosequantur et defendant*; and that it was agreeable to reason

that it should be so, for otherwise many persons who never intended to practise would be made attorneys, in order to entitle themselves to privilege. But it was answered by the Court, that as long as the Defendant was an attorney on record, he ought to have the privilege of an attorney, and that if he was not qualified to be an attorney, the Court might be moved for a rule to strike him off the roll. *Cont. Breke v. Bryant*, in *K. B.* 7 T.R. 25.

WEBB v. THOMSON.

THIS was an action on a policy of insurance, tried before *Eyre Ch. J.* at *Guildhall*, Sittings after *Hilary Term*.

The policy was effected on a ship called *The Golden Grove*, Captain *Hodder*, bound from *London* to the *West Indies*, and warranted to depart with convoy. She sailed from *Spithead*, the place of rendezvous, in company with a convoy under Sir *Hugh Cloberry Christian*, and was afterwards wrecked on the coast of *Dorsetshire*.

At the trial it was proved that the captain, and a passenger on board, who was supposed to have seen the sailing orders, were drowned at the time of the ship being wrecked. The second mate being examined, as to his knowledge respecting sailing orders, stated that the captain left the ship for the purpose of obtaining them from the Admiral; and that afterwards on a signal for sailing, the captain being asked in what manner it should be answered, gave the necessary directions. But the testimony of

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v.
BIRCH.

May 6th.
2 B&S. & P.M.
165.

Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule.

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the mate being shaken by Admiral *Christian's* evidence, a verdict was found for the Defendant.

Adair Serjt. now moved for a rule nisi for a new trial.

This case involves two questions. First, whether, in point of fact, Captain *Hodder* ever received sailing orders; and secondly, whether, in point of law, the actual receipt of them be necessary to the performance of a warranty to depart with convoy. All the evidence of which the nature of the case admitted was given at the trial. The captain, whose testimony was most necessary to establish the receipt of orders, and the only other person supposed to have seen them, were drowned. Under these circumstances I submit that the Court will presume the receipt of sailing orders. The point of law has never been expressly decided. Mr. Justice *Buller* seems to have questioned the necessity of sailing orders in all cases in *Hibbert v. Pigou, Park on Insurances*, p. 341., where that point had been incidentally touched upon by Lord *Mansfield*. So in *Victorin v. Cleeve*, 2 Str. 1250. *Lee* Ch. Just. and the Jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy, and that those agreements were never confined to the precise words, and the Plaintiff recovered.

BULLER J. (absente Eyre Ch. J.) Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. In point of law then, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou* my expression is, "It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." And the case of *Victorin v. Cleeve* goes no further. If the captain from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.

The other Judges concurring,

The Plaintiff took nothing by his motion.

In a note, inserted in the last edition of *Part on Insurance*, p. 341, the following case is mentioned, which seems to agree in principle with the above decision. It was the case of *Wedon v. Wilmet*, at *Guildhall*, 1744, in the time of Lord Chief Justice *Lee*, where the ship insured had departed from *London*, and arrived at the *Downs* 22d *August*; where the *Grafton* and *Leven* (the convoy) were

under sail, and the captain sent one of his men on board for sailing orders, which were refused; but the Commodore said, "Keep on, " and I will take care of you;" and the ship being lost that night by striking on the shore, the question was, if the ship was just under convoy, having no sailing orders? and it was held she was, and the Plaintiff had a verdict.

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v.
THOMSON.

BAPTISTE v. COBBOLD.

May 8th.

THE plaintiff in this action was a sailor, and declared on a contract for 52*l.* 10*s.* for run-money, against the Defendant, being captain of a ship bound from the *West Indies* to *London*.

At the trial, before *Eyre* Chief Justice, at *Guildhall*, Sittings after *Hilary Term*, a note was given in evidence, by which the Defendant agreed to allow the Plaintiff the above sum; *together with a pint of rum per day*; the latter part of the agreement, however, appeared to have been added to the note after signature. Verdict for the Plaintiff.

Cockell Serjt. now moved for a rule nisi, to enter a nonsuit. He relied on a variance between the declaration and the evidence; the former describing a contract for 52*l.* 10*s.* only, and the latter proving the additional stipulation for a pint of rum *per day*. He contended that the contract, being entire, could not be separated; he cited *Sands and Tash v. Ledger*, *Ld. Raym.* 793., and *Bristol v. Wright*, *Dougl.* 640., and said that this case fell within the principle of a variety of others.

BULLER J. The agreement given in evidence corresponded with the declaration, as far as the declaration went. The case in *Lord Raymond* turned upon the description of a written agreement, which, if described at all, must tally with the description; here no written agreement was described. It is true that the agreement given in evidence contained something more than was stated in the declaration, but not material to it.

EYRE Ch. J. At the trial, I was inclined to consider the latter promise as no part of the agreement; it was totally different from the main body, which was so executory, that nothing was to arise upon it till the voyage was complete; whereas this part was to be put in force from day to day, and determined before this cause of action arose. Besides, the addition was made after sig-

Declaration for 52*l.* 10*s.* for run-money; evidence, a note for 52*l.* 10*s.* for run-money, with an additional stipulation written after signature of the note, for a pint of rum *per day*, and held no variance.

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v.
CORBOLD.

nature, and seemed to be inserted merely to ascertain what quantity of rum should be distributed to the crew.

The Defendant took nothing by his motion.

May 9th.

*Pofl. 357.
3 B&f. & Pull.
221.
2 New Rep. 381.*

A Frenchwoman, and her husband, come over to England. The husband gives her a power of attorney, to transact his business, and goes to Hamburg. She cohabits with another man, and trades on her own account with the Plaintiff, by whom she is arrested. Under these circumstances, the Court will not discharge her on a common appearance, on the ground of her coverture, although the Plaintiff appears to have been acquainted with it.

DE GAILLON v. VICTORIE HAREL L'AIGLE.

SHEPHERD Serjt. having obtained a rule to shew cause, why on the Defendant in this action entering a common appearance, the bail-bond should not be set aside, and all further proceedings against the sheriff of Middlesex be stayed, it came on this day.

In November 1792, the Plaintiff M. *De Gaillon*, a M. *L'Aigle* and the Defendant Madame *L'Aigle* his wife, came over together as emigrants from France to England. In July 1795, M. *L'Aigle* left England for Hamburg, and then gave a power of attorney to the Defendant to manage his affairs. In pursuance of which she drew and accepted bills for him. Since the husband's residence in Hamburg, he had carried on business with the house of Dubois and son in London, and the Defendant had cohabited with another person of the name of Montelun, who called himself *Piccardy*, by whom she had a child, and with whom she had been carrying on trade. In June 1796, the Plaintiff wrote the following letter to the Defendant: "Will you, or can you procure me merchandize for 700l. as soon as possible; I will send you immediately 300l. on account, and I will send your husband goods to the amount of 600l. to Hamburg; and in return he will send me French goods to that amount, such as brandy, hollands, or what he may think most advantageous to me." Soon after this the Plaintiff deposited 300l. in the hands of the Defendant, for which she gave him a receipt in her own name. The Plaintiff having obtained no goods, pressed the Defendant to repay the 300l. which he had advanced, upon which the following arrangement took place. The Defendant gave the Plaintiff 100l. in goods, and four bills on her husband, for 50l. each; the bills were in form as follows:

"One month after date, please to pay to the order of M. *De Gaillon*, 50l. sterling, value received.

(Signed) " Wife *Harel L'Aigle*, by virtue
 " of power of attorney."

M. *L'Aigle*

M. *L'Aigle* accepted the bills, but on their becoming due refused to pay; on which they were returned to *England* protested, and the Defendant was arrested for the sum of 180*l.*, being the balance due to the Plaintiff on the whole transaction.

The Defendant stated in an affidavit the Plaintiff's knowledge of her coverture at the time of her coming over to *England*: the Plaintiff, on the contrary, denied in his affidavit any intimate acquaintance with M. *L'Aigle*, and declared that he had reason to suppose from the Defendant's conduct in *England*, that in fact she was not married to him.

Le Blanc Serjt. shewed cause. Where it has been known for certain that the Defendant was a married woman, the Courts have discharged her (*a*); but where it has been doubtful, or collusion has appeared, they have put her to her plea of coverture, and let the question be tried; and this I apprehend they will do, where the money is advanced to her on her own account. She has not stated in her affidavit that her husband is likely at present, or ever, to return to *England*. The letter of attorney from M. *L'Aigle* was only colourable.

Shepherd Serjt. in reply. Had this been a separate trade by the Defendant, I could not have argued the question. The Plaintiff's affidavit consists of inferences only, which are contradicted by his own acts, and letter. He cannot say that he did not suppose the Defendant married, as his own expression in the letter "I will send to your *husband*" would refute that assertion. He therefore dealt with her rather as an agent than as a separate trader. The Defendant did not draw the bills as a *feme sole*, but signed them "Wife H. *L'Aigle*," and the Plaintiff received them, and never brought this action till the bills were returned protested from *Hamburgh*. If the party has passed herself upon the world as a single woman, the Court will give her no relief; but if she was known to be married, it is otherwise. *Pearson v. Meadon*, 2 *Bl. Rep.* 903. So in *Waters v. Smith*, 6 *Term Rep.* 452. the Court said, "Though when a married woman imposes on a trader, and contracts on her own credit, we will not relieve her in a summary way; yet where it has clearly appeared that the Defendant was a *feme covert*, and there has been no contrariety of evidence about that fact, the Court has discharged her out of custody on filing common bail." Here the Plaintiff knew that she was married, and employed her to transact business with her husband. Therefore it is her husband's, and not her debt.

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EYRE Ch. J. In my apprehension you mistake the evidence. The letter contains two distinct transactions. In the first part, the Plaintiff desires the Defendant to supply him with goods to the amount of 700*l.*, for which he promises to advance 300*l.* immediately; and this has no connection with the husband. Then in the second part, he states his intention of sending goods to the husband at *Hamburgh*, for which he expects an adequate return. The Plaintiff obtained 100*l.* from the Defendant in goods, and bills for 200*l.*, making in the whole 300*l.*; the sum in which she, as acting for herself, was indebted to him. To whom then was the Plaintiff creditor? He was creditor to the husband in one case, for 600*l.* which he had sent to *Hamburgh*, and for which the husband was to return 600*l.*, and as I understand, he did so. To the wife, the Plaintiff had advanced 300*l.*, and not receiving the goods which he had desired, to the amount of 700*l.*, required security. She gave him 100*l.*, and bills; and on the bills being protested, he arrested her. This last transaction was with her, not with the husband; the Plaintiff having advanced the money on that trade which she was carrying on in *England*. I cannot but consider that these parties came from *France*, where it is not unusual for the wife to deal separately from the husband. In this case the husband resided at *Hamburgh*, she lived with another man, and he made no objection. She must therefore be responsible for her own trading, and should not be allowed to shelter herself under the name of her husband, who is in a foreign country.

BULLER J. We are not called upon to decide whether the Defendant be married or not. It may happen that her coverture may be a good defence. These cases afford no general rule. They turn on nice circumstances. If the 300*l.* had been advanced on the husband's account, I should have wished the Court to interpose; but she took it for her own use. The husband had no connection with her trading. The observation of my Lord, that these parties are *French*, is very material. In *France* married women have many rights, which are allowed to none but single women in this country. If she received the 300*l.* on her own account, she is entitled to no favour. A discharge is a favour; and the question now is, Whether we are to grant a favour or not? If she can prove a marriage at the trial, it may be a defence at law. Let her put her coverture on the record.

HEATH J. The Plaintiff took the bills from the Defendant, drawn by procuration, as the only security which he could obtain

obtain for his debt. But the money was originally advanced to her as a feme sole.

ROOKE J. On the opening of this question I wished for further discussion, but on discussion am entirely satisfied. Let her plead her coverture.

Rule discharged.

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In *Pritchett qui tenu v. Racked Croft*, 2 H. Bl. 18. where a rule for discharging a feme covert, who resided apart from her husband, was made absolute, *Gould J.* seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the Defendant's affidavit. He mentioned the case of *Mrs Baddeley*, 2 Bl. 1679., where the Court were not satisfied

with an affidavit, but put her to plead her coverture; and he said he had always understood that such was the course both in *K. B.* and *C. B.*

P. Holt J., a married woman is to be discharged upon Common Bail of course; but if it be doubtful whether she be married or not, she shall be held to Special Bail, if the cause require Special Bail. 7 Mod. 10.

KEAY and Another, Affinees of TAYLOR a Bankrupt,
v. RIGG.

19th May.

2 Bof. 15
Pull. 30.

SHEPHERD Serjt. on a former day obtained a rule to shew cause why the defendant in this case should not be at liberty to enter a suggestion on record, pursuant to the 22 G. 2. c. 47., of his being an inhabitant and resident within the parish of *St. Mary, Lambeth*, and liable to be summoned for the debt for which this action was brought before the Court of Requests for the Town and Borough of *Southwark* in the County of *Surry*, and that the damages recovered in this action did not amount to the sum of 40s.; and why the Plaintiffs should not lose their costs in this action, and pay to the Defendant his costs in this action, and also of this application.

The Plaintiffs declared as affinees for tailors' work done by the bankrupt, and the cause was tried before *Rooke J.* at the fittings at *Guildhall* after last *Hilary Term*. The original demand (which had never been objected to till the action was brought) was 2*l.* 1*s.*; but the jury found a verdict for 1*l.* 16*s.* only.

Adair Serjt. now shewed cause. My objection is singly this, that the Court of Requests has no authority to try a question of bankruptcy. There is no decision, I believe, upon the point; I must therefore submit it to the Court on the nature and reason of the case. The words of the statute which gives the jurisdiction are cautious; they are "touching such debts." The intricacy attending questions of bankruptcy is well known, and how unfit the courts erected by this and similar statutes are to try them. It would

The Court will not refuse leave to enter a suggestion under the 22 G. 2. c. 47. on the ground that a Court of Conscience has no authority to try a question of bankruptcy.

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would be dangerous to those commercial cities in which courts of this nature are established, if it were in the power of every one to draw questions of bankruptcy before such tribunals, by laying the damages under 40s. I contend therefore that the words of the statute do not bind the Court to an inconvenient construction, and that the silence of an act should not (as is sometimes the case) be carried too far.

Shepherd contrâ. The Plaintiffs in this case are personal representatives; now though an executor Defendant cannot be sued in these courts, *Aitway v. Burrows*, Doug. 263. yet a Plaintiff administrator is bound to sue in them, *Waſe v. Wyburd*, Doug. 246. In the Court of Conscience act for *Middleſex*, 23 G. 2. c. 33. f. 19., if the damages are less than 40s. the Plaintiff can have no costs, unless the judge certify that the bankruptcy, or title to the freehold, came principally in question; the Legislature therefore considers bankruptcy within the cognizance of these courts, and unless excepted by the statute establishing the court in question, it falls of course within its jurisdiction.

EYRE Ch. J. It might have been prudent in the Legislature to have made the exception contended for. But if a general jurisdiction be given, the trial of bankruptcy is incidental to it. The Plaintiff must make out his claim before these tribunals, however that claim may be constituted; though bankruptcy, or any other question, should happen to be connected with it. Many intricate points may be incidental to a defence, in which case these courts must do as well as they can: the present objection is only quarrelling with the jurisdiction of the court.

The words "touching the debts" are very extensive. The jurisdiction is general, and it is incumbent on the Plaintiff to shew an exception. My brother *Adair* complains of the silence of an act being carried too far, but here he wants to insert an exception not warranted by the act itself: that is making the act speak. The case is not of that importance which has been stated: questions of bankruptcy seldom lie in so narrow a compass as 40s.; nor are they in general very intricate. It would be cruel to make such small debts as arise on bakers' bills, and milk scores, the subjects of litigation in the superior courts, because a question of bankruptcy is involved.

BULLER J. seemed to think that there were authorities on the subject, and wished them to be looked into. He said that if an action would not lie in these courts for a debt arising in consequence of a judgment of a court of law, perhaps it might not for a debt arising

arising in consequence of the decision of the commissioners of bankrupt, who have an equitable jurisdiction.

Leave was given to enter the suggestion, unless any authorities should be produced.

On the 19th, *Adair* again mentioned the case of *Ailway v. Burrows*, as containing a principle which would support his argument. There Lord *Mansfield* held, that although there were no express exception, yet if one were implied from the nature and reason of the thing, it was sufficient. If that were so, the instance cited of acts containing express exceptions furnished an argument to prove that such a jurisdiction was against the reason of the thing. Taking all the acts together they appeared to form one code of legislation, and questions of bankruptcy being excepted by 23 Geo. 2. c. 33. s. 19. they were excepted in all.

ROOKE J. In that act, bankruptcy is not excepted, unless the judge certify that it came principally in question, and no certificate could be expected in the present case.

EVRE Ch. J. Even under that act the local courts have jurisdiction over the excepted matters, if the parties think proper to apply to them, but if they apply to the superior courts, they shall be protected; provided a certificate be made, that those matters came principally in question; for the object is not to withdraw any jurisdiction from the local courts. It would be much better that debts under 40s. should be given up, than that they should be sued for in the superior courts.

Leave given to enter the suggestion.

In the Exchequer Chamber.

KIRBY and Another v. SADGROVE, in Error.

EROR from the Court of *King's Bench*. The declaration there was in trespass, for cutting down the trees of the Plaintiff below, growing in the parish of *South Moreton* in the county of *Berks*. Plea: That the trees grew in a certain common field in the said parish, and that one *F.K.* was seised in his demesne as of fee, in a certain farm in the said parish, and prescribed for a common of pasture for his sheep, levant and couchant, throughout the said common field, in respect of such estate for himself, his

May 10th.
S.C. 6 T.R.
483.
S.C. 3 Anstr.
892.

If the lord of the manor plant trees on a common, a commoner has no right to abate them.

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his tenants, &c. every year when the common field should be sown with corn, from the cutting down and carrying away the same, until the said common field should be re-sown with corn. It then stated a demise of the said estate from F. K. to Kirby the Defendant below, in right of which he entered upon the same, and because the said trees at the time when, &c. had been wrongfully planted, and were wrongfully growing upon the said common field, incumbering the same, and damaging, &c. so that Kirby, the Defendant below, could not without cutting down the same, enjoy his common of pasture *in so ample and beneficial a manner as he otherwise might and ought to have done*; he in his own right, and the other Defendant below, as his servant, and by his command, cut down the said trees, &c. Replication: That the said common field whereon the trees were growing, was parcel of the contiguous manors of Sandeville and Bray in the county of Berks, and of the wastes thereof, and that the Plaintiff below was *Lord of the manors*, and that he planted the said trees, &c. To which there was a general demurrer and joinder: and judgment for the Plaintiff below. For the former arguments in this case see 6 *Term. Rep.* 483.

Shepherd Serjeant for the Plaintiff in error. The replication does not deny the allegation that the trees were an interruption to the enjoyment of the commoner's right, in as ample a manner as he was entitled to exercise it; and is bad because it does not state that the lord left a sufficiency of common, which question ought to have been put in issue and tried. I mean to contend, that when the lord does an act by which the right of the commoner is not totally destroyed but only partially interrupted, he may equally take his remedy by abating the nuisance, and is not confined to his action for damages, as argued on the other side. A right to common without a sufficiency would be a nugatory right. The *Statute of Merton*, 20 Hen. 3. c. 4. *Statute of Westminster* 2. 13 Ed. 1. c. 46. and 3 & 4 Ed. 6. c. 3. establish three rights; ingrefs, egrafs, and sufficiency of common when on the common; and these are described as three things which the lord shall not infringe. The words of the *Statute of Merton* are, " Whenever such feoffees do " bring an affize of novel disseisin for their common of pasture, " and it is acknowledg'd before the justices that they have as much " pasture as sufficeth to their tenements, and that they have free " egrafs and regrefs from their tenement unto the pasture, then let " them be contented therewith." Sufficiency of common is the right, and ingrefs and egrafs are the means of enjoying it. The distinction

distinction of the other side admits that the commoner has a right to assert by his own act ingrefs and egrfs, but not the actual enjoyment of a sufficiency of common. For it is allowed that if the lord plant a hedge, or build a wall, so as totally to exclude a commoner from the exercise of his right, he may abate the nuisance. The reason is given by Lord *Mansfield* in *Cooper v. Marshall*, *Burr. 265.* "Because every such obstruction is directly contrary to the terms of the grant; a hedge, a gate, or a wall to keep the commoner's cattle out, is inconsistent with the grant which gives them a right to come in." On the same principle I contend, that when the lord erects any thing, whether hedge, gate, house, or tree, which destroys either of the commoner's three rights, he may abate it. In every other case of nuisance, whether totally or partially destroying the parties' right, he may abate, as in *5 Co. 101. b. Penruddock's case*, *9 Co. 55. Batten's case*; and this is a general proposition, relating not only to property in possession, but to rights. As in the case of a water-mill, the owner of the mill having a right to the water of a water-course, may, if the water be stopped in another's lands, enter those lands and remove the dam. So if a way be stopped, he who has the right of way may abate the stoppage, whether it be total or partial. (*Eyre Ch.J.* said there was a distinction taken in *Fitz. N.B. p. 183.* in the note. "If a way be so stopped, that the party can pass but narrowly, an action on the case lies; but if it be wholly stopped, an affize, *14 H. 4. 31.*") A distinction has been attempted between an act illegal in itself and an excess; but this would make trespass almost essential to constitute a nuisance, which it is not; the term nuisance is not applicable to the mode of doing the thing, but to the thing done, and to its effect on another. If the lights of a house be obstructed, so that the possessor is prevented from enjoying in *tam amplio modo*, he may abate what causes the obstruction. See *Sir William Jones 222.*; thus in *Rex v. Pappineau*, *1 Str. 688.*, which was an indictment for a nuisance, Lord *Raymond* said, "Regularly the judgment ought to be to abate so much of the thing as makes it a nuisance; if a house be built too high, so much of it as is too high shall only be abated." In *Penruddock's case* the nuisance was clearly only partial, and it was held that the party might abate. If there can be no abatement in this case, the lord may inclose almost all the common, not perhaps leaving enough for an hundred sheep, or even for one, or he might build a town on the common, and yet there could be no abatement. In *Bro. Abr. title Common, Pl. 9.* it is said, "Where I have common

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"in another's land, and the owner makes a hedge on the land "where the common is, I may break down the whole hedge; "but if he incloses the whole land in which the common is, by "making a hedge on other land which surrounds the land in "which the common is, I may *not* break down the whole hedge, "but only part, so as to have a way to the land where the com- "mon is, and this is the diversity." So *Co. 2 Inst. p. 88.* "If "the lord doth inclose any part, and leave not sufficient com- "mon in the residue, the commoner may break down the whole "inclosure, because it standeth on the ground which is his "common." See also *29 Ed. 3. 6.* Now this proves that the commoner may abate a nuisance on the common, as well as one obstructing his way to the common, only confining his abatement to the extent of his injury. The facts of this case do not vary the principle. Upon the record it must stand confessed that the lord infringes the right of common *tam amplio modo*. He does not say, I did this act as lord, and left a sufficiency, which he ought to do, for otherwise he does not shew, that he has planted legally. In *Mason v. Cæsar*, *2 Mod. 66.*, the commoner did not state that he was deprived of his enjoyment *altogether*, but only *in eâ parte* where the hedges stood, and so justified pulling them down; and the issue was, whether he could enjoy *tam amplio modo*, &c. and judgment was given for the commoner. This warrants my argument; for it is the same thing whether a hedge or a tree be planted on the common. (*Buller J.* Are you aware that *Mason v. Cæsar* was decided on the point that the hedge was no part of the soil.) Meddling with the soil or not does not decide the question; if it did, it would equally apply where the obstruction was total as where it was partial. For in both cases the lord is equally entitled to the soil, and in the latter the commoner's right to abate has been acknowledged. As in *29 Ed. 3. 6.* where the defendants justified cutting down trees, because they were planted in a hedge which deprived them of ingress to the common. It is true that there are several cases (a) to shew that a commoner has no right to destroy the beasts or coney-burrows of the lord, though they do not leave him a sufficiency of common; and the reason why abatement is not there allowed, is because the beasts and conies are only in the nature of a furcharge. A free warren is compatible with a right of common: but the right exercised here is incompatible. An erection

(a) *Cope v. Marshall*, *2 Wils. 51.* *Cooper v. Marshall*, *Burr. 259.* and the cases there cited.
by

by the lord is no enjoyment of the common *qua* common, but is rather a subtraction of the common itself. In the case of free warren the commoner may not redress himself; for though his right and that of the lord are not of the same nature, the modes of enjoyment are. A surcharge is not a continued nuisance, but an erection is: to confine the party therefore to an action, would be to give him a perpetual right of action. Suppose the commoner were to bring an assize of nuisance, he would then have a right to abate after recovery: then why should he not as well abate before? for the reason for abatement given in the books is to prevent a multiplicity of actions. There is no distinction in principle, between *destroying* the enjoyment of a right and *preventing* the enjoyment *tam amplio modo*. There are cases where total and partial obstructions of rights have been considered as equally abatable; and I have found none the other way but those relating to free warren.

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Williams Serjt. for the Defendant was stopped by the Court. *EYRE Ch. J.* This case is governed by that of *Cooper v. Marshall* unless a good distinction can be stated between them. A tree is not an erection on the soil; it is the very fruit and produce of the soil, it is part of the soil and freehold itself, and does it not pass as such? In public ways you might abate a tree, because it would *necessarily* be a nuisance. But in cases like the present, it will be a nuisance or not, according as it injures the easement or not. This case has been argued as if it were a case of approvement under the *Statute of Merton*; but in fact it is no such thing. The right here exercised by the lord is an original right in the soil, prior to that of common, which is only concurrent with it. But where there is a right of common the lord's right must be so exercised as not to injure the commoner. If the lord so use it as to *destroy* the easement, such an act would be considered as a nuisance, and abatable. If the easement be injured to a certain degree only, or if it may be a question whether injured or not, in the nature of things it cannot be a subject of abatement. The easement in question is a right of pasture over the whole soil, consistent with a free warren in the lord, and, as I think, with a right to plant. If the easement be injured, the commoner may bring his action and have satisfaction in damages. Even where the right of common is totally destroyed, and the commoner may, generally speaking, abate the nuisance; yet if he cannot abate it without interfering with the right of soil in the lord, he must not pursue that remedy. We cannot overturn the case of *Cooper v. Marshall*.

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Marshall. Indeed we ought to adhere to it, not only as founded in principles of law, between the commoner, and his lord, but also in principles of general convenience. Abatement ought to be allowed in very few cases; for the abator is judge in his own cause. The just measure of damages sustained will be best found by an action. Unless the clearest analogies compel us to pronounce in favour of abatement, there can be no reason to strain a point in order to give that remedy. It is a remedy in addition to that given by action, and ought to be allowed but sparingly. I think the case of *Cooper v. Marshall* decisive.

Judgment affirmed.

May 11th.

CROWDER v. WAGSTAFF.

The Court will not give leave to compound in a penal action, after verdict, unless the Defendant can shew circumstances which entitle him to such an indulgence.

LE BLANC Serjt. moved for leave to compound in a *qui tam* action after verdict on the usual affidavit, saying that the same had been done by consent in the King's Bench. (a)

Shepherd Serjt. on the part of the Plaintiff consented.

Sed per Eyre Ch. J. What case do you make for such indulgence? We cannot pay attention to the consent of the Plaintiff, after verdict. I do not know that the Court can do this without the consent of the Attorney General. It is no longer compounding; the debt is ascertained, the suit is at an end, and the Crown may intervene. Here the affidavit states no circumstances to entitle you to this indulgence, if we are at liberty to grant it; at least you ought to state a case of favor. You must pay the whole money into Court. (b)

(a) The case alluded to by *Le Blanc* probably was *Maugban v. Walker*, 5 T.R. 98. but there favorable circumstances were stated on the part of the Defendant.

(b) In *Bradshaw v. Mottram*, 1 Str. 167. the Plaintiff obtained the leave of the Court, to compound with the Defendant

who was then in execution, on an affidavit of his poverty. But in *Berry qui tam v. Levy*, 1 Blac. Rep. 443. which was a popular indictment on the coal act, the Court refused leave to compound after verdict, saying that the King's moiety was vested.

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SPENCER v. SCOTT.

*May 11th.**Post, 50. 2 New
Rep. C. B. 82.*

SHEPHERD Serjt. shewed cause against a rule obtained by **Run-**
nnington Serjt, on a former day, to set aside the proceedings
in this action for irregularity, with costs.

The Plaintiff had sued out a *quare clausum fregit* against
Walter Scott and **Richard Shaw**, and had declared against **Scott**
only.

Shephrd. When on the face of the writ, the action appears
to be founded on a contract, and two persons are there men-
tioned, the declaration must be against both; but where the
writ does not import a contract, it is otherwise. Almost all
writs are against two, the name of *John Doe* being generally
inserted with that of the real Defendant, and the Court will not
now for the purposes of this rule, take notice that *Richard Shaw*
is not a fictitious person.

Runnington in support of the rule. I know of no such dis-
tinction, as has been stated; if the declaration be against one,
and the writ against two, the proceedings are irregular; and even
upon the above distinction, it may be observed here, that though
the writ was a *quare clausum fregit*, the notice of declaration was
debt on contract.

EYRE Ch. J. My brother **Shepherd** states it to be the prac-
tice to put any names into the writ, as *John Doe*; which is very
intelligible; the writ here is only the process by which this De-
fendant was brought into Court, and the notice of declaration
given afterwards is right. If *John Doe* be ever joined in the
writ with the real Defendant, it follows that proceedings are not
to be stayed because two names appear in the writ, and one only
in the declaration; for *John Doe* is never inserted in the de-
claration.

Rule discharged without costs. (a)

(a) See post, *Stables and Another v. Abbery and Others* (last case in this term), post, 49.

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May 12th.

EVANS v. WEAVER.

In an action on a promissory note, the Court will not change the venue from London to the county where it was made, on the Defendant's stating that all his witnesses live there: but if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will.

THIS was an action on a promissory note for 40*l.* in which kind of action the general rule is, that the Defendant cannot change the venue.

Williams Serjt. having obtained a rule to shew cause why the venue should not be changed from London to Shropshire, on an affidavit that the Defendant had a good defence at Ludlow in Shropshire, and that all his witnesses lived there, as well as the usual affidavit.

Clayton Serjt. for the Plaintiff. All the allegations in the Defendant's affidavit may be true, and yet there may be no ground for the present application. For perhaps he may have only one witness at Ludlow, and then it may be more inconvenient for the Plaintiff to carry down his witnesses than for the Defendant to bring up his.

Williams for the Defendant. It is not the first time (a) that an application has been made on the ground of the Defendant's witnesses living at a distance. The only question is, whether the Court shall deviate from the usual practice, and I submit that where the affidavit discloses circumstances singular or extraordinary it will.

Per Curiam. The Defendant only swears that he has a good defence, and that all his witnesses live at Ludlow; but he does not state what are the grounds of his defence, nor whether he has one, two, or three witnesses, or how many. If he had a number of witnesses all living there, and he were to state that on his affidavit, and shew that a serious inconvenience would arise from bringing them up, it might induce the Court to deviate from the general rule. But if the Defendant should have one witness only, the Court would hardly change the venue on account of that one. It might be more expensive to the Plaintiff to carry down his witnesses to Ludlow, than for the Defendant to bring up his to London. It will be easy to state the circumstances on an affidavit.

On the 19th *Williams* produced a supplemental affidavit, stating that the defence on which the Defendant intended to rely, was a

(a) See *Foster v. Taylor*, 1 T. R. 781. *nistratrix v. Moore*; *Poole v. Horobin*, and *Flacke v. Godfrey*, in a note to the above case.

set-off for money paid, lent, had, and received, and account stated; that he had three witnesses living at *Ludlow*, all of whom were essential to establish his defence; that it would be necessary to prove a judgment for 4*l.* 5*s.* in the town-court of *Ludlow*, (which however the Plaintiff offered to admit,) and that this application was not made for the purpose of delay.

On which the rule was made absolute, the Defendant consenting to allow judgment to be entered up as of *Trinity* term, in case of a verdict for the Plaintiff at the assizes.

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May 15th.

THE bail in this action being brought up to justify, *Shepherd* Serjeant asked one of them, how long he had known the Defendant? But the Court thought the question improper. And on *Shepherd's* suggesting that the bail had not been acquainted with the Defendant above three or four days, and that he was *indemnified* by the Sheriff's officer,

It is no objection
to bail that they
are indemnified.

Per Curiam. The sufficiency of the bail is the object of which the Court are to take care: there is no impropriety in their being indemnified: it is a very common practice.

Bail allowed.

TAYLOR v. SHUM and Others.

May 16th.

DEBT for rent against the assignees of a term.

Pleas. First, That the term estate and interest in the premises did not come to the Defendants by assignment: and issue thereon. Second, That the Defendants did not by virtue of any such assignment, enter into and become possessed of the premises: and issue thereon. Third, That before the rent demanded, or any part of it became due and payable, the Defendants assigned to one *William Bishop*.

There is no fraud in the assignee of a term assigning over his interest, to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease.

Replication. That the said supposed assignment to the said *William Bishop* in the third plea mentioned, was had and made by the said Defendants, by the fraud and covin of the said Defendants, with intent to defraud the said Plaintiff of her said debt: and issue joined thereon.

Qu. If the replication *per fraudem* by the lessor, to a plea of assignment in such a case, can ever be good? Cer-

tainly not, where the party assigning derives no benefit from the premises.

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The premises in question were demised in the year 1788 by the Plaintiff to one *Hannah Adams*, for twenty-one years, and afterwards came by several mesne assignments to one *Sibley*: in the year 1792 *Sibley* mortgaged the lease to the Defendants, who on his becoming insolvent, and abandoning the premises, took possession, and paid the rent up to *Christmas* 1795; at which time they offered to surrender the premises to the Plaintiff, and on his refusal to accept, assigned over to *William Bishop*: since that time the Defendants had neither enjoyed the premises nor paid any rent: nor had *Bishop* taken possession, or received the lease.

This cause came on to be tried at the fittings after last *Hilary* term in *London*, before *Eyre Ch. J.*, when a verdict was found for the Plaintiff, with leave for the Defendants to move to set it aside and enter a nonsuit.

Accordingly *Le Blanc* Serjt., having on a former day obtained a rule to shew cause, and cited the case of *Le Keux v. Nash*, *Str. 1221.* where an assignment to a prisoner in the *Fleet* was held good,

Shepherd Serjt. for the Plaintiff now produced an affidavit, stating that the Defendants had informed the Plaintiff that *William Bishop* the assignee lived in *Harp Lane*; but that although upon inquiry one or two persons of that name were found there, yet they had no knowledge of the assignment. He admitted that the Defendants might select a pauper for the purpose of assigning over to him, but insisted that there must be a good and valid assignment, so as to give the same remedy against the pauper as might have been had against the Defendants, otherwise the execution would be fraudulent. That if this were not the case they might have assigned to a non-entity. (*Bulker J.* If they execute to a non-entity it is no assignment.) He contended that the Defendants had not legally divested themselves, for they had not made such an assignment as would bind the assignee, he never having had possession of the premises, or delivery of the lease. He cited *Philpot v. Hoare*, *Ambl. 485.*, where an improper description of the residence of the assignee was one of the grounds on which the assignment was held fraudulent.

Le Blanc contra was stopped by the Court.

EYRE Ch. J. It was no part of the case at the trial that there was no such person in existence as the person described in the assignment; the assignment was admitted on the pleadings. The real question is, whether the Defendants could assign to whom they

they pleased, so as to destroy their own liability. If you have no remedy against the assignee, you must lose your rent, and get possession of the premises as soon as you can. The only case in which a question of fraud could arise, is, where the assignor has kept possession of the premises, of which he makes a profit, and has made an assignment to prevent responsibility. But even there, if the possession be profitable, there will always be something on the premises for the landlord to distrain; so that I doubt whether there can ever be such a thing as a fraudulent assignment, and whether an issue on such a point can ever be well taken. It is clear that there is no fraud in assigning to a beggar (*a*), or to a person leaving the kingdom, provided the assignment be executed before his departure. The Defendants had a right to divest themselves of the interest, by the mere form of an assignment, which drives the Plaintiff to take possession.

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BULLER J. An assignee is only liable while he continues to be legal assignee; that is, while he is in possession under the assignment (b). I will first consider the case as it stood at the trial, and next as it stands upon the facts of the affidavit. What was to be tried? not whether an assignment had been made or not; that was taken *ex concessis*; it was admitted on the record. Where the assignor continues in possession, is the only case where the replication *per fraudem* can be good; here the Defendants were clearly not in possession, and had no use of the premises; then what becomes of the issue? Secondly, has any thing appeared since the trial to shew that justice has not been done? the very reverse. Was the Plaintiff taken by surprise? It is true, that he has found a person of the name of *Bishop*, respecting whom there is some doubt, if he be the person mentioned at the trial; but the Defendants have received no benefit; they offered to give up the premises, which offer was refused. The Plaintiff adhered to the strict point of law against the justice of the case; the law is against him, and therefore he shall have no indulgence.

HEATH J. This action is founded on the privity of estate (c); but here there is none, therefore the Plaintiff is not entitled to recover. So far from fraud appearing, the Defendants declared their

(s) *Piteber v. Tovey*, *Sask.* 81. 4 *Mod.*
71. S. C. (b) *Vide Walker v. Reeves*, *Dougl.* 461.
in the note, and *Buller's N. P.* 159.
(c) *Cartb.* 177.

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desire of surrendering before they assigned, but the Plaintiff refused to accept.

ROOKE J. Of the same opinion.

Rule absolute. (a)

May 16th.

BENTON v. SUTTON.

If a sheriff's officer having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison, it is an escape.
Q. Whether it would not have been an escape also, if the officer himself had accompanied him.

DEBT against the Defendant as sheriff of *Surry*, for an escape of a prisoner in execution. This case came on to be tried before *Runnington Serjeant*, sitting for *Hotham Baron*, at *Kingston Spring Assizes* 1797.

In a suit, in which *Benton* was the Plaintiff, and one *Evans* the Defendant, a writ of *capias ad satisfaciendum*, returnable on the 3d of November, was sued out on the 1st of June against *Evans*, and delivered at the sheriff's office, and a warrant made out thereon to *Donolly* and *Benton* (the Plaintiff's father). Soon after a similar writ issued against *Evans* at the suit of one *Tibbits*, returnable on the 7th of November, and a warrant was made out thereon to one *Purkiss* the sheriff's officer: by virtue of which last writ *Evans* was arrested on the 27th of September, and carried to a lock-up house belonging to the officer. On the 2d of October he was permitted by *Purkiss* to go in company with *one of his followers* of the name of *Isaacs*, to his own house, for the purpose of settling his affairs, and on the 3d was seen riding in *St. George's Fields*, in a chaise-cart, attended by the same person. On these facts *Runnington Serjeant*, being of opinion that no escape had been made out, directed a nonsuit.

Shepherd Serjt. on this day shewed cause against a rule obtained by *Le Blanc Serjt.*, for setting aside the nonsuit and granting a new trial.

Shepherd. *Evans* was not arrested under the writ at the suit of the Plaintiff, but under that at the suit of *Tibbits*: a warrant was made out on the Plaintiff's writ, and put into the hands of *Benton* his father, with an injunction not to enforce it at that time: this last fact came out upon the cross-examination. Though therefore the Plaintiff's *capias ad satisfaciendum* was lodged in the sheriff's office in the month of June, and *Evans* might consequently be considered in execution at the suit of both, and so the present Plaintiff might maintain an action for an escape, yet the fact to

(a) Vide *Pake's N. P.* 238. *Burdillon v. Dalton and Others.*

which

which I have alluded would be a sufficient answer, and though not mentioned in Mr. Serjt. *Runnington's* notes, might perhaps save expence, if allowed to be proved now.

EYRE Ch. J. I see no great force in that fact. When the Plaintiff first took out the warrant, he might not intend it to be executed; but on *Evans* being arrested at the suit of another, he might then intend it to be enforced. *Evans* being once in execution under other proceſs, it would be very difficult to discharge him from any writ in the office.

Shepherd. The law acknowledges but two kinds of custody. Custody of the gaol, and custody of the officer. When *Evans* was arrested he was taken to the house of the officer, not to the county gaol: and the supposed escape was his going with a servant of the officer to his own house, for about an hour. Now the cases on this point are, where the party had once been in gaol: as *Balden v. Temple*, Hob. 202. *Platt v. Lock*, Plored. 35. So the case of Sir Miles Hobart and William Stroud, Cro. Car. 209. was decided on the ground of their having once been within the limits of the *Gate-house Prison*. For if a party has once been in gaol, he can never *quit* it without an escape in the sheriff. I admit that if *Evans* had ever been *at large* this would have been an escape: but the question is, whether he can be considered as ever having been at large, when attended by a bailiff's servant. I contend that the bailiff had him always (if I may use the expression) in his manual possession. It has never been held that an officer is bound to take a party to *prison* before the return of the writ; but he must keep him in safe custody: while he is with the officer he is in safe custody, whether he be in the house, the street, or elsewhere. This is not like the case of *Hawkins v. Plomer*, 2 Black. 1048. For there the prisoner was stated to be *at large*, and that means out of the *custody* of the officer, not merely out of the officer's *house*. Here there was no escape from gaol, for the prisoner was never there; and no escape from the officer, for the prisoner was as much in his custody at the time of the supposed escape, as when he was in his house.

Le Blanc contrà. It is admitted that if *Evans* had gone alone, it would have been an escape; therefore it is admitted that an escape may as well take place before the return of the writ as afterwards. Put the case thus: May a sheriff's officer allow a prisoner to be at *any time* in *any place*, before the return of the writ, provided there be some person appointed by the officer with him? If the Court allow this, they must say, that if the sheriff were to send the

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the *prisoner's* father, or brother, or any other person, with him, that would be *arcta custodia*. The distinction is between execution, and mesne process (*a*). On the latter, the sheriff may let the prisoner go upon his honour or promise, and is not liable to be punished, provided he have him at the return of the writ. But with respect to the former, it is different; there if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him. *Atkinson v. Mattison*, 2 T. R. 176. The writ of *capias ad satisfaciendum* having a return day as well as mesne process, the only distinction between them would be destroyed, if a continued custody of the prisoner were not enforced, for the purpose of making satisfaction to the Plaintiff by the dures of imprisonment. The confinement of the Defendant's person is the only means of compelling payment of the debt; it is not therefore a sufficient custody, if the prisoner be permitted to go about with the officer, *Hob.* 292. (*b*) much less with a servant of the officer, *Plowd.* 35. If the dures of imprisonment be relaxed more than is necessary to carry the writ into execution in a convenient time and manner, I contend that it is an escape. In *Bl.* 1048. the prisoner was never committed to gaol; and the principal question was, whether there could be an escape out of execution before the return of the writ; and it was held there might. The house of the officer is the gaol, so long as he keeps the prisoner there. For whatever place is necessary to secure the prisoner, is for that purpose a gaol. In process of execution the sheriff is liable in case of rescue, even before the prisoner is carried to gaol. For it is said in Sir *Thomas Jones*, 197. "that the custody of the bailiff is the custody of the sheriff; and if a prisoner be rescued out of the custody of the bailiff, the sheriff should return it as a rescue out of his own custody." So that the only question is, whether *Evans* was at large or not, when the servant of the officer, having the warrant in his possession, was with him. But the bailiff cannot give authority under the warrant to his servant; for the warrant is directed to a particular person. Either caption or recaption must be in the legal presence of the bailiff. It has been determined in several cases, and the rule of law is perfectly clear, that he may allow another to lay hold of a party in his presence, but not out of it. For there is no such thing as an absolute delegation of his authority to a third person. Here then *Evans* was not in legal custody; and if he had attempted an escape, the follower could not legally have resisted him. One who

(*a*) *Plank v. Anderson and Another*, 5 T.R. 37.
(*b*) *Vid. etiam Boyton's Case*, 3 Co. 44. a.

has no authority to arrest a person in the first instance, can have no authority to detain him in custody.

EYRE Ch. J. The cases go no further than to say, that it is an escape in the sheriff where the prisoner is *at large*; what shall be deemed being at large, and therefore an escape, may be difficult to ascertain; and whether in this particular case the indulgence shewn to the prisoner will be an escape, may admit of considerable doubt. But one part of the argument struck me as very difficult to be answered, namely, that *Evans* was in no custody at all, under the circumstances of this case. The custody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the prisoner if he had chosen to escape, and the warrant would have been no justification to him, if any mischief had happened; which reduces the case to this point, that the prisoner was found absolutely at large. On this narrow ground, I am prepared to say that the nonsuit was wrong. On the general one, I think it would require some consideration. Undoubtedly the effect of process of execution is to operate immediately by the durels of imprisonment; and cases may be put, where, if the officer attempted to justify any length of indulgence, under colour of the prisoner being always in his presence, the Court would say that it was an escape. Suppose the officer wore the livery of the prisoner, and rode with him to a horse-race, this would be contrary to the exigency of the writ. Whether any distinction can be safely drawn between this last strong case, and the laudable and compassionate one, of accompanying the prisoner to his house, for the purpose of enabling him to examine his books, and settle the means of discharging his debt, I should have considerable doubt. On the narrow ground, however, it is clear that the prisoner was not in legal custody.

BULLER J. I am perfectly satisfied that the nonsuit was wrong. What my Lord has dropped is extremely correct, and I agree in the instance which he has put, that if the prisoner had gone to a horse-race attended by a bailiff, it would have been an escape: and I think that no distinction can be made between such a case as this, and one which originates in more laudable motives. Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape. It has been asked whether an action on the case would lie for not arresting on the earliest opportunity. I have no doubt but that it would; but the damages must depend on the particular circumstances. Let

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us put a *caveat*. The last day of last *Trinity* term was the 15th of *June*. Suppose a *capias ad satisfaciendum* to have issued on that day, and proof that the officer to whom the warrant was directed was in company with the person named in the writ on the 16th, and that he omitted to arrest him: on the 4th of *November* he does arrest him, and on the 6th brings the body into court: if on the 16th of *June*, when the officer was in company with the prisoner, he was in good circumstances, and between that day and the 4th of *November* he has become a bankrupt, the Plaintiff may say to the officer, I have lost my debt by your not putting the party in restraint sooner, I have sustained damages, and am entitled to recover them by an action. When a prisoner is removed by *habeas corpus*, if the officer carry him out of the direct road, it is an escape. The case in *Blackstone's Reports* pretty well establishes the proposition, that there may equally be an escape, whether the party has been committed to gaol or not. In this case what was done by the follower or officer (if an officer he can be called) was not done in execution of the writ. He took the prisoner from the bailiff's house to his own, and for what purpose signifies nothing; he might as well have carried him to a horse-race.

HEATH J. What is said in *Hobart* 202. (a) is very material. The rule seems to be that a party must be taken to prison in a convenient time. What is convenient is a question for the determination of the judge, who will admit of all reasonable delay: but if that be made use of by the officer, as a means of giving more liberty than he ought, he will be liable for an escape. (b).

ROOKE J. I think the nonsuit wrong, on the ground which my Lord has stated, that the prisoner was not in legal custody. I shall give no opinion on the general ground: I have no doubt, however, that where a party has been really injured by the sheriff's neglecting to arrest on the earliest opportunity, an action will lie for the injury sustained.

Rule absolute. (c)

(a) In *Balden v. Temple* Lord *Hobart* says, "Let keepers of prisons beware when they receive an *habeas corpus* from *Chancery*, or any other court; bearing teste in the end of a term, to have the body of one in execution in the court the next term, that they do not, by colour of such writs, suffer the party to go at large all the mean time (as it is sometimes practised); for the writ war-

" rants no more, but that he be brought out of prison only for that purpose, and only for so much time as in judgment of law shall be convenient and necessary for the execution of the writ, and no more: which in *privilegiis adversis* must ever be strict."

(b) *Vide Cro. Car.* 14.

(c) *Vide Rees v. Green*, 1 *Burr.* 437.

1797.

In the Exchequer Chamber.

SYKES v. HARRISON, in Error.

May 17th.

EROR on a judgment in the King's Bench in an action of covenant, for liquidated damages. The Plaintiff in error was non-proffed.

On a former day *Dampier* moved "that it should be referred to the clerk of the errors, to calculate the amount of the interest upon the final judgment recovered in this cause, in His Majesty's Court of King's Bench, from the time of the allowance of the writ of error, until the signing of the non-pros in this Court, and that such interest might be added to the damages, for which such final judgment was entered up." But the Court seeming to think there might be some difference between this and the case of an affirmation of judgment, only granted a rule to shew cause.

Giles now shewed cause, and said that he would not contend for a distinction between a judgment of non-pros, and a judgment of affirmation, as he found no cases to warrant it, and the 3 H. 7. c. 10. did not appear to allow such a distinction. But on the authority of *Shepherd v. Mackreth*, 2 H. Bl. 284. submitted that as it was a matter entirely in the discretion of the Court, to allow interest in the shape of damages or not, they would not give it, where the delay was not imputable to the Plaintiff in error, for in such case the Defendant was entitled to no indulgence. He stated that final judgment in the King's Bench was signed on the 6th of July 1795, soon after which the writ of error was brought; that in the Michaelmas Term following, the Plaintiff in error filed a bill in the Exchequer, and obtained an injunction; that the answer was not put in till the 11th of February 1796, to which exceptions were taken and allowed; that an order was then made to amend the bill, which was accordingly done, and that a further answer was not put in till the 27th June 1796, and the injunction was not finally dissolved till the 15th December following. He contended, that notwithstanding the injunction, the Defendant might have proceeded to non-pros the writ of error, by a motion of course in the Exchequer; 1 *Fowler's Practice in the Exchequer*, 330., and that consequently the delay was on his side. He could not complain of the Plaintiff's depriving him of the fruit of his judgment, when in fact he was only tied up by an injunction.

At

The Court of
Exchequer
Chamber will
allow interest to
a Defendant in
error, under the
3 H. 7. c. 10.
in a judgment of
non-pros as well
as on a judgment
of affirmation.
Note; For the
future, the in-
terest allowed
will be 5*l.* per
cent. instead
of 4*l.*

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At all events the delay was imputable to him since the 10th of December, as the injunction remained in force till that time only.

EYRE Ch. J. We certainly have no jurisdiction to inquire into the proceedings in equity. But the Plaintiff having proceeded there without just ground, as the event has shewn, is a strong reason to induce us to go as far as we can against him.

Dampier then suggested, that as money was now so much risen in value, if the Court should not allow the Defendant in error 5*l. per cent.* although 4*l.* had been the usual sum, it would be enabling the Plaintiff in error to fight the Defendant with his own money.

Giles contra, relied on the cases of *Shepherd v. Mackreth*, and *Lord Lonsdale v. Littledale*, 2 H. Bl. 287., where the Court allowed 4*l. per cent.* only.

Per Curiam. The better way will be to allow 4*l. per cent.* only, in the present instance, and to give notice that 5*l. per cent.* will be allowed in future.

Rule absolute.

May 17th.

S.C. 5 T. R. 558.

S. C. 3 Anfr.

781.

12 East, 671.

2 New Rep. 348.

Where judgment for the Defendant on a special verdict, is reversed in the Exchequer Chamber, that Court on motion will give a final judgment for the Plaintiff.

In the Exchequer Chamber.

DENN ex dem. MELLOR v. MOORE in Error.

JUDGMENT on a special verdict in ejectment having been given for the Defendant in the King's Bench, and reversed in this Court,

Chambre now moved that it might be added to the judgment, that the Plaintiff do recover his term, damages and costs. He cited *Philips v. Bury, Lord Raym.* 10. Carth. 181. 319. and *Skinm.* 514., where Holt Ch. J. said "There would be a difference where judgment was given upon demurrer, and where upon a special verdict: where it is upon a demurrer, the Courts above ought to give a judgment for the Plaintiff (if they reverse that for the Defendant), and then it is sent down, and a writ of inquiry goes, and upon that the Court below gives a final judgment (a); but where it is upon a verdict, there, if they reverse a judgment they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the Court below." (b)

(a) *Winchcomb v. Shepherd*, Cro. Eliz. 746. *Falderoe v. Ridge*, Cro. Jas. 206. (b) *Mulcany v. Ayres*, Cro. Car. 511. *Omulconrie v. Ayres*, Roll. Abr. 774. See also 2 *Sandred.* 237. 256.

The Court seemed at first to doubt whether they should grant this in the first instance, or only give a rule to shew cause, but on consideration, thinking the point decided, said: that the Plaintiff must enter up his judgment at his own peril, for if he entered it wrong, he subjected himself to another writ of error, and reversal in another court.

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Denn

Moore.

Accordingly leave was given, in the first instance, to enter up judgment of reversal, and that the Plaintiff should recover his term, damages and costs.

ANDERSON v. NOAH.

May 18th.

THE Defendant in this action having been arrested by the name of Noah, and put in bail by the name of Noel: It was objected by *Le Blanc* Serjt. at the time of justification, that there was no bail in the action before the Court: but the Court gave leave to amend the bail-piece.

Minomer in
the bail-piece
amended.

LANG Demandant, LEE, Gent. Tenant, and WOOD-

May 18th.

HOUSE and Others Vouchees.

ON this day *Rumington* Serjt. defired the opinion of the Court, on two objections, suggested by one of the officers, to the passing a common recovery.

The first objection was, that at the foot of the praecipe at bar, it was stated that, "the tenant in person voucheth to warrant "John Chappel Woodhouse, clerk, Ann Monpeffon, spinster, and "Mary Woodhouse, widow," whereas the dedimus was, "the "tenant in person voucheth to warrant Mary Woodhouse, wi- "dow, John Chappel Woodhouse, clerk, and Ann Monpeffon, "spinster;" transposing the names.

The second and more material objection, originated in the warrants of attorney, taken by virtue of the commission. For there being three vouchees, two of them had given one joint warrant of attorney, and the other had given his on a separate piece of parchment, when in strictness the warrant ought to have been joint, that is, all on one piece of parchment.

It is no objection to the passing a common re-covery, that the order of the names of the vouchees in the praecipe at bar, and the dedimus varies. Nor that the warrants of attorney of the several vouchees, are on separate pieces of parchment.

He said, that it was the wish of the officer, that this matter should be mentioned to the Court; though both the warrants of attorney being annexed to the dedimus, could not be construed to

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to relate to any other premises than those contained therein. He added that all the parties were desirous that the recovery should pass.

The Court (absente Eyre Ch. J.) thought that there was nothing material in either of the objections. (a)

And *Heath* J. said, that the warrants would be good even in a real suit.

(a) In Hil term 1799 in C. B. where *Thomas Gent* was defendant, *Dobey Gen.* tenant, and *Robert Leaper Percy* and *Grace his wife*, and *Edmond William Percy* and *Mary his wife, sister and coparcener with Grace, vouchees*, the same objection as the last in the above case was taken and overruled, after a reference to this case.

May 18th.

HOLWARD v. ANDRÈ.

1 Term. 59.

Where bail are opposed, and rejected, and the

Defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition.

BAIL in this action were opposed and rejected on a former day, and the Defendant surrendered on the next; fresh bail being now brought up for justification.

Cockell Serjt. insisted, that the Defendant not having been a prisoner at the time of the former opposition, the Plaintiff was entitled to the costs of that opposition, before the new bail could be suffered to justify.

Sed per Curiam. The Court will not insist on the costs of a former opposition being paid to the Plaintiff, where the Defendant is surrendered on the next day. It has lately been determined otherwise.

May 19th.

GARDNER v. BAILLIE.

A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of costs there.

LE BLANC Serjt. moved that the prothonotary might review his taxation in this case, and allow the costs of a bill of exceptions.

Per Curiam. The bill of exceptions is no part of the record, till after judgment; if it were, the Court ought to take it into consideration before judgment; which is never done (a). The cause proceeds, and judgment is given here, as if there were no bill of exceptions; this may be accounted for, by the practice which formerly prevailed, of trying all causes in bank. The bill

(a) In 27 H. 8. 24, 25. in the King's Bench, *Fitzjames*, C. J. said " *Ex rigore juris* a party shall not take advantage of a bill of exceptions in arrest of judgment, but shall be put to his writ of error, and this is good to be observed in C. B., for the party may have a writ of error

" here; but from this court he has only his writ of error to Parliament, which would be a great delay, and cost to him; wherefore it is prudent that we should examine the matter before judgment." See also *Enfield v. Hills*, 2 Lev. 236. and *Bullock's N.P.* 316.

of

of exceptions is carried into a Court of Error, and there annexed to the record; if it had been part of the record here, there would be no occasion to send for the judge to acknowledge his seal; when that is acknowledged, it is then, for the first time, annexed to the record. Being for the benefit of the party who tenders it, and remaining in his possession, it is in his breast to employ it or not. Regularly it ought to be tendered at the time of the trial, and sealed by the Judge in Court; and though the practice is to allow the counsel to tender it afterwards, and some expence may arise to the parties before it is settled, yet this is not in a regular course of proceedings, upon which costs can be incurred. If the record be lengthened by the bill of exceptions, costs will be allowed for copying, fees to counsel, &c. by the Court of Error. But there can be no costs in the Court below.

Le Blanc Serjt. took nothing by his motion.

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SAUNDERS v. PITTMAN.

May 20th.
Pg^t, 103.

A RULE having been obtained by *Runnington* Serjt. to shew cause why the trial in this case should not be put off till next Hilary term, on an affidavit, stating that a master of a vessel employed in the Southern Whale Fishery, was a material witness in the cause, and that he was expected to return about Christmas next,

Shepherd Serjt. shewed for cause an affidavit, stating that this action was brought on articles of agreement in the possession of the Defendant; that the Defendant had delayed the cause, and prevented the Plaintiff from going to trial, while the Defendant's witness was in *England*, by withholding from the Plaintiff a copy of the articles, till he had moved the Court; when the Plaintiff found himself obliged to amend. He added that after the amendment, the rule to plead happened by mistake to be in the original cause, instead of the amended one, and that the Defendant refused to waive that advantage, which produced a further delay.

Runnington contra.

Per Curiam. The Court will not in all cases be content with a common affidavit to put off a trial. It must be satisfied that injustice would be done, if such an application were refused. Here a poor Plaintiff claims a debt; he wants to amend his proceedings by the articles of agreement, and the Defendant delays shewing them till he is obliged so to do; and in the mean time his witness

The Court will not put off a trial at the instance of the Defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay.

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~~SAUNDERS~~~~PITTMAN.~~

leaves *England*. He has therefore brought himself into this difficulty, by endeavouring to take an unfair advantage, and the Court will not consider itself obliged to put off the trial of a cause for the accommodation of the Defendant, if the Defendant has not conducted himself fairly and candidly, and if he might have had his witness.

Rule discharged.

*May 20th.*9 *E&B*, 436.

The general term *cōsts* in a rule of reference, does not include the *cōsts* of that reference.

BRADLEY v. TUNSTOW.

By an order of the Chief Justice, made with the consent of the parties, for referring this cause to arbitration, it was ordered,

“ That the debt for which this action is brought, be referred to F. C. Esq. to settle and determine how much, or if any and what sum is due to the Plaintiff from the Defendant, and that for what sum he shall find due, the Plaintiff shall be at liberty to enter up his judgment, and sue out execution for such sum so found due, together with his *cōsts*, provided the said debt so to be settled and ascertained amount to 40*s.*

The arbitrator awarded 40*l.* 14*s.* for the debt, and *cōsts* to be taxed by the prothonotary. His taxation amounted to a certain sum including the *cōsts* of the reference; on which *allocatur* judgment being entered up by the Plaintiff, the Defendant applied to the prothonotary to strike out the *cōsts* of the reference; who, on reconsidering the matter, disallowed them accordingly.

Le Blanc Serjt. on a former day having obtained a rule *nisi* to set aside the judgment for this irregularity,

Shepherd Serjt. for the Plaintiff, contended, that where a cause was referred to arbitration, and the Court directed the *cōsts* of the cause, to abide the event of the arbitration, and nothing was said in the rule about the *cōsts* of the reference, the *cōsts* of the reference became part of the *cōsts* of the cause, and so he understood the practice to be in the *King's Bench*.

Le Blanc contra, said, That under the rule the *cōsts at law* (a) only, followed the event of the award; and if the *cōsts* of the reference were intended to be included, the arbitrator ought to have awarded them, which he had not done; that as the reference was matter of mutual accommodation, the *cōsts* ought to be paid by both parties equally, unless otherwise directed by the rule.

(a) *Coupl.* 127. 2 *Black.* 953. *Tidel's Practice in K. B.* 545, 546.

EYRE

EYRE Ch. J. It is impossible to say that the judgment in this case is irregular, for it follows the *allocatur* of the prothonotary. The question therefore is not properly brought forward, but as it is before us, we may as well decide it. The whole difficulty arises from the supposed practice of the *King's Bench*. If that Court has sanctioned the practice of including the costs of reference under a condition in the rule, relating to costs generally, I do not feel myself at liberty to speculate upon the point. It appears however to me, that a reference being made for the convenience of both parties, the expences ought to be sustained by both. A provision for the costs of reference being generally made in the rules, but omitted in the present instance, is a strong argument to shew that they were not here intended to abide the event of the arbitration.

BULLER J. The general practice in drawing up these rules, is to distinguish between the costs of the reference, and the costs of the cause; the latter usually abide the event of the arbitration, the former not. Here that distinction is omitted, it is referred to the arbitrator to determine the sum due between the parties, and the costs are to follow the event of his award. I am inclined to think the practice of the *King's Bench*, as suggested, to be right. Does not the term *costs* mean all costs? I do not see how to distinguish between the costs of the cause, and those which arise in the progress of the cause. All costs which arise between the writ and the judgment, unless otherwise provided for as the cause goes on, must be considered as the costs of the cause. But as we have seen these costs of reference amount sometimes to very hard sums, it might not perhaps be foreign to suppose, that they were purposely omitted in this rule to avoid the possibility of such expence. If there are any authorities on the subject, I think we must be bound by them.

HEATH J. I wish an uniformity of practice to prevail in the two Courts.

ROOKE J. If there be any case in the *King's Bench* to that effect, I think the costs of the reference should abide the event of the arbitration; otherwise I should be of opinion with my Lord, that they ought not to be included.

The prothonotary having been desired to inquire concerning the practice of the *King's Bench*, on this day reported that he had been informed by the Master, that though no case had occurred within his knowledge, where this question had arisen under the order of a Judge; yet that it was generally understood that

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an arbitrator had no power to give the costs of the award, unless under a provision inserted in the order of *nisi prius*.

Per Curiam. As we find the practice of the King's Bench does not warrant the idea of including the costs of the reference under the general term *costs*, the Plaintiff must now move to reform his judgment by consent, and reduce it to the proper amount. But as the judgment was, strictly speaking, regular, and the Plaintiff was under the necessity of opposing this motion, we shall not allow the costs of this application. (a)

(a) An award of "Costs sustained in the action," does not include costs of the reference, *Browne v. Marsden and others.* 1 H. Bl. 223.

May 23d.
P. 228.

If an affidavit to hold to bail be entitled " Plaintiff and Defendant," it is bad.

HOLLIS v. BRANDON.

CLAYTON Serjt. moved for a rule to shew cause, why the Defendant should not be discharged out of the custody of the Warden of the Fleet, on entering a common appearance, on the ground of an irregularity in the affidavit, by which he was held to bail.

The affidavit was intitled "Edward Hollis Plaintiff, and William Brandon Defendant," and proceeded to state "that William Brandon, the Defendant in this cause, is justly indebted to this deponent in the sum of £ — for work done and performed by this deponent and his servants in and about the business of the said Defendant, and for the said Defendant; and for divers materials found and provided in and about the said work; and for money lent and advanced to the said Defendant at his special instance and request."

The Defendant had been arrested on a bill of Middlesex and bailed, and afterwards surrendered himself to the King's Bench Prison, from whence he was removed to the Fleet by *habeas corpus* before declaration delivered.

On these facts the Court granted a rule to shew cause, but suggested to the Plaintiff that he might file a supplemental affidavit.

On the 16th, *Shepherd* Serjt. shewed cause against the rule, and contended that there was no necessity for a supplemental affidavit, as the original one was sufficiently positive.

Clayton Serjt. in support of the rule. The affidavit was here intitled *Edward Hollis Plaintiff and William Brandon Defendant*, at a time when no cause in fact existed. An order was actually made in this very case, by one of the justices of the King's Bench, for the discharge of the Defendant, but he having been removed

to

to the *Fleet*, the warden could not obey that order, and therefore the question is brought before this Court. In *King v. Cole*, 6 T. R. 640. the affidavit being intitled, "R. King qui tam v. T. Coles," the Defendant was discharged on common bail. Also in a case of Sir John Call Bart. v. —— before *Ashurst J.* the Defendant was discharged on the same ground, and no objection made. This case is still stronger, as the affidavit was not only intitled with the names of the parties, but had the addition of Plaintiff and Defendant. It is a general rule, that a Defendant shall not be deprived of his liberty, unless the Plaintiff can be indicted for perjury if his affidavit be false. It must therefore be positive. There being a doubt in the present instance, whether an indictment for perjury could be maintained or not, the Court has given the Plaintiff an opportunity to file a supplemental affidavit, which he has not done. On the above grounds therefore I submit that the rule must be made absolute.

Shepherd Serjt. contra. This case may be distinguished from that of *King v. Cole*. There, the name of *T. Cole* was not added to the word Defendant in the body of the affidavit, whereas here the Plaintiff speaks of *William Brandon* the Defendant. Besides, the word "Defendant" may be rejected as surplusage, for it is positively sworn that *William Brandon* was indebted.

EYRE Ch.J. The idea of a supplemental affidavit proceeded on a collateral ground: it was suggested with a view to ascertain who was meant by the person called Defendant. The Court understood that the affidavit was intitled, but that no name was added to the word "Defendant" in the body of it. If there be no other description of the person indebted, the word "Defendant" is loose and uncertain, and ought to be supplied; but when the affidavit says, "William Brandon Defendant," I should much doubt whether it would be bad, merely because it was intitled "Edward Hollis Plaintiff and William Brandon Defendant," before the commencement of the cause. Since the statute for suing out bailable writs, it may be a question whether an affidavit to hold to bail be not in fact a commencement of the cause. Why is a writ considered as the commencement of the cause before the parties are in Court? and yet it always is so. This way of considering it will not break in upon what has been said, that in an indictment for perjury, if the indictment state the perjury to have been committed "in an affidavit in a cause," and there be no cause, the party cannot be

convicted:

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convicted: but here I doubt whether the affidavit be not a commencement of the suit.

BULLER J. It has been said that if the Plaintiff was indicted for perjury there might be a doubt whether he could be convicted on a supplemental affidavit. Have not the Court jurisdiction? An application is made to them to discharge the Defendant in the regular exercise of their jurisdiction: they require a second affidavit to ascertain the debt: there can be no difficulty then in the assignment of perjury.

The Court having taken time to inquire, *Eyre Ch. J.* this day said: We have considered this question, and have found, upon inquiry, that it is the settled practice of the *King's Bench*, that in a motion for an information, if an affidavit be intitled in a cause, it is rejected. We think the rule should be universal, for the only ground on which it is founded is, that it would be difficult if not impossible to indict for perjury upon such an affidavit. We think also that the practice of both Courts should be uniform.

Rule absolute without costs (a).

(a) Subsequent to this, in the case of *Clarke v. Carvilleorne*, Tr. T. 1797, the Court of K. B. considered the practice of intitling affidavits to hold to bail too common to be deemed erroneous: and accordingly in two other cases then before them, discharged similar rules to the present: but at the same time determined to make a rule of Court ordering that such affidavits should not be intituled for the future. *Vide 7 T. R. 321.*

JOLLIFFE v. MORRIS.

May 26th.

The Court of C. B. will make the payment of costs for not proceeding to trial, a term of discharging a rule for judgment as in case of a nonsuit.

SHEPHERD Serjt. on a former day obtained a rule to shew cause, why judgment as in case of a nonsuit should not be entered up in this case, for not proceeding to trial according to the Plaintiff's undertaking.

The Court now inclining against him, on an affidavit of merits shewn by *Runnington* Serjt., and a peremptory undertaking to try at the next assizes offered;

Shepherd desired that payment of costs for not proceeding to trial might be made a term of discharging the rule.

The Court seemed at first to doubt whether, if a party elected to move for judgment, as in case of a nonsuit, he did not thereby waive the costs of not proceeding to trial; and if intitled to them, whether it was not necessary to apply by a separate motion; but

having read a note (a) from the book of one of the officers, by which it appeared that the practice of this Court differed from that of the *King's Bench* in this respect, they said that costs for not proceeding to trial might be given on the motion for judgment as in case of a nonsuit, and accordingly with that condition

Discharged the rule.

(a) The name of the case mentioned in the above note, where the Court of K. B. refused to give such costs, unless on a separate motion, was *Triands v. Goldsmith* and *Another*.

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RICE v. BROWN.

May 27th.
6 Eas^t, 505.
A pauper, as such, can never pay costs.
S^tm^b. That he may receive them for the defaults of his opponents.

THE Plaintiff in this case sued as a pauper: and the cause standing in the paper for trial, on the first sitting in *Easter Term*, was on that day made a remand, until the second sitting in the same term, by an order of *nisi prius* at the instance of the Defendant, he undertaking to pay the costs of the day, and also of that application. The order was made a rule of this Court, and the costs allowed by the prothonotary; but the Defendant refused to pay them: in consequence of which, *Runnington* Serjt. on a former day moved for an attachment.

When this was first mentioned, the Court seemed to entertain strong doubts whether a pauper could be allowed costs; and *Runnington* was desired to look into the matter.

On this day he contended, that it was regular for a pauper to recover costs, and that it was the practice to allow them, where, had he not been a pauper, he would by the verdict have been entitled to them. He cited 3 Bl. Com. 401., where it is said, "a pauper may recover costs, though he pays none;" and *Scatchmer v. Foulkard*, 1 Eq. Ca. Ab. 125., where Lord Somers, after much inquiry, ordered costs to a pauper; "for though he were at no costs, or at small costs, yet the counsel and clerks did not give their labour to the Defendant, but to the pauper." He said in *Walker v. Packer*, Cooke's *Cases of Practice in C.P.* 47., the Court ordered costs to be taxed against a pauper for not proceeding to trial, and declared that a pauper should pay costs for all defaults, as an executor or administrator should for their own defaults (b). If then a pauper was liable to pay costs for his own defaults, why

(b) See also 1 Str. 420.

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should he not receive them for those of his opponent. He urged that in this case, it was hardly within the discretion of the Court to refuse them, since the application was founded on consent, and a voluntary undertaking to pay the costs which had been made a rule of Court.

Cockell Serjt. contra, said, (and it was allowed on the other side,) that the pauper had not the smallest merits on the trial.

Per Curiam. The case that has been cited respecting the payment of costs by a pauper, is not law. The mode of proceeding by the Court is this: where a pauper misbehaves himself, he is dispaupered in consequence (*a*), and so becomes liable to costs. In this case, however, the attachment must issue.

(*a*) *2 Str. 1122. 2 Salk. 506. 3 Wif. 24.* recovered in a second, the Court refused to deduct out of the recovery in the second action the costs of the first.
and the cases cited therein. In Butler v. Innes, 15 Ux. 2 Str. 891. a pauper having been nonsuited in a first action, and having

*May 27th.**3 Campb 30.*

Plaintiffs were incorporated by the name of "the Mayor and Burghesses of the borough of Stafford," and sued by the name of "the Mayor and Burghesses of the borough of Stafford." This is in abatement, and not in bar.

Mayor and Burghesses of STAFFORD v. BOLTON.

THIS was an action on the case for tolls. The declaration began, "That whereas the town of Stafford in the county of Stafford is, and from time immemorial hath been, an antient borough; and the burghesses of the said borough from time immemorial have been a body politic and corporate in deed, fact, and name, and have been confirmed by divers letters patent, of divers late kings and queens of England, at divers times, by divers names of incorporation, and for divers, to wit, fifty years last past, have been such body politic and corporate, by the name of the Mayor and Burghesses of the borough of Stafford." It then went on to state that, "the said mayor and burghesses had been accustomed to repair the pavements of the said borough, for the more convenient bringing of corn and grain into the said borough, and by reason thereof had been accustomed to receive a reasonable toll for all corn or grain brought into the said borough, to be sold or delivered to any person within the said borough; that one E. H. brought into the said borough, within the same to be delivered, and within the same actually delivered to the Defendant, divers, to wit, forty bushels of oats; that thereupon the said mayor and burghesses demanded of the Defendant half a bushel of oats as and for the said toll; " that

"that the said Defendant refused to deliver the same to the
"said mayor and burgesses," &c.

Plea not guilty, and issue joined thereon.

This came on to be tried before Thomson Baron, at Stafford
Spring Assizes 1797.

The Plaintiffs produced in evidence a charter of 12 Jac. 1. which after reciting, "That whereas our borough of *Stafford* in the county of *Stafford* is an antient and populous borough, "and the burgesses of that borough from time whereof, &c. have had, used, and enjoyed divers liberties, &c. as well by our charters, as those of divers of our progenitors and predecessors, late kings and queens of *England*, to them and their predecessors, sometimes by the name of burgesses of *Stafford*, and sometimes by the name of burgesses of the borough of *Stafford*, and sometimes by the name of burgesses of the town of *Stafford*, and sometimes by the name of the bailiffs and burgesses of the borough of *Stafford* in the county of *Stafford*, and by other names heretofore made, granted, or confirmed, as also by reason of divers prescriptions, usages, and customs in the said borough, used and accustomed," &c. and also reciting letters patent of 3 Jac. 1. by which the burgesses and inhabitants of the borough aforesaid, "by whatever name or names they had been theretofore incorporated, or whether they had been lawfully incorporated or not, for the future for ever, without any doubt or ambiguity thereof, were incorporated by the name of bailiffs and burgesses of the borough of *Stafford* in the county of *Stafford*," &c. proceeded: "We will, ordain, constitute, and grant, that the said borough of *Stafford* in the aforesaid county, in future, may and shall be a free borough of itself, and that the bailiffs and burgesses of that borough, and also all and singular the burgesses and inhabitants of the same borough, by whatsoever name or names they or their predecessors have heretofore been incorporated, and whether they have been heretofore incorporated or not, and their successors in future, for ever may and shall be by force of these presents one body corporate and politic, in deed, effect, and name, by the name of the Mayor and Burgesses of the Borough of *Stafford* in the county of *Stafford*; and them by the name of the Mayor and Burgesses of the borough of *Stafford* in the county of *Stafford*, one body corporate and politic, in deed, effect, and name, really and to the full for us, our heirs and successors, we do erect, ordain, constitute, and declare by these presents, and that by the same name they shall have perpetual

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"petual succession, &c. and that by the same name of mayor and "burghesses of the borough of *Stafford* in the county of *Stafford*, "they may plead and be impleaded, answer and be answered "unto, defend and be defended, in any courts and places, and "before any judges and justices, &c. in all and singular actions, " &c. in the same manner and form as any other our liege subjects of this kingdom of *England*, persons able and capable in law, or any other body corporate and politic within our kingdom of *England*, are able to plead and be impleaded, answer "and be answered unto, defend and be defended," &c.

On this evidence, the Defendant's counsel objected that there was a variance between the name of the corporation in the charter and that in the declaration; and after some argument, the learned Judge nonsuited the Plaintiffs.

On the 1st day of this term *Williams* Serjt. obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial be had. He cited *Bro. Abr. Misnomer* 73. *Briefe* 398. and 10 Co. 122.

Le Blanc Serjt. now shewed cause. This is a corporation by prescription and charter; the charter contains a recital of the various names by which the Plaintiffs have been known, but makes no mention of that by which they have declared: it gives them a particular name by which they may sue and be sued, and to which therefore they are bound to adhere. A corporation by charter can have no other name than that which it receives from the Crown, and whenever any subsequent charter is accepted by a particular name, all former names are done away. The questions are; Whether the mayor and burghesses of the borough of *Stafford* be the same as the mayor and burghesses of the borough of *Stafford* in the county of *Stafford*? and whether the variance could be taken advantage of on the trial, or ought to have been pleaded in abatement? Suppose an action for toll brought by *A. B. C.*, and it appeared that the right was in *A. C. D.* could they have recovered? Suppose the Plaintiffs had called themselves the mayor and burghesses of the borough of *Stratford*, they would not have shewn themselves to be the persons entitled to the toll. If you admit a variance of locality, you may admit a variance of person: by first taking away one part and then another, though each separate variation be of small importance, the name will be completely altered. There are cases where variances in the names of corporations have been passed over; as in *King's Lynne*, 10 Co. 123. but all those were cases of leases or other securities; and

and it is laid down in the Books that "there is a sound difference
 " betwixt writs and grants," 10 Co. 125. b. So in *Gib. C. B.*
 234. "there is a difference between writs, declarations, &c. and
 " obligations and leases; for if the name of a corporation be
 " mistaken in a writ, a new writ may be purchased of common
 " right, but it were fatal if mistaken in leases and obligations,
 " and the benefits of them would be wholly lost; and therefore
 " one ought to be supported, and not the other. *John Abbot*
 " of *W.* granted common of pasture to *I.S.*, by the name of
 " *William Abbot of W.*; this is good enough *causa quæ suprad*;
 " but if this name had been thus mistaken in a writ, it had
 " been fatal." As for the case of *King's Lynne*, it was an at-
 tempt by the Defendant to avoid his own deed; besides the ver-
 dict had found that the obligor had made the bond to the Plain-
 tiffs, by the name in the declaration. If that name be altered in
 the description of a corporation which is given to it by charter,
 it ceases to be a corporation. It is laid down every where, that
 locality is of the essence of a corporation; if so, leaving that un-
 certain, or giving it a wrong description, is completely changing
 the name. The Court can draw no line in variances of this kind.
 It is true, that in the 25 Ed. 3. 48. where a *præcipe quod reddat*
 against the prior of *Worcester*, was *præcipe priori Wigornie*, and
 the prior pleaded that in *Worcester* there were two priories, viz.
 the priory of Friars Preachers, and the priory of Our Lady,
 and that it ought to have been, *Priori Ecclesiae S. Marie Wi-*
gornie de Wigornia; the writ was abated. But there it was the
 Defendant who was misnamed; he knows his proper title, and
 may abate the writ, and give a new one. But here, unless the
 Plaintiff's demand the toll in the name given them by the Crown,
 they shew no title (*a*); for although a Plaintiff may reply that a
 Defendant is known as well by the one name as the other, he
 cannot reply that of his own name.

Shepherd Serjt. on the same side.

Williams contrd was stopped by the Court.

EYRE Ch. J. If it cannot be denied that this variance might
 have been pleaded in abatement, it decides the question. The
 arguments on the part of the Defendant go to shew that it ought
 to be in bar. A corporation is a mere creature of the Crown,
 having no essence but what is derived from its name. On strict
 reasoning therefore I should be inclined to think, that if a corpo-
 ration sued by a name which did not belong to it, it would be as

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(*a*) *Patrick and Pogger's case*, at O.B. Session, February 1783, before *Bull r J. Leach*, 244.
 nothing.

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nothing. In the case of a mistake in the name or description of an existing person having a right to sue, it may be pleaded in abatement. But the case in *Brooke, Misnomer* 73. seems to put a corporation in the same situation with a natural person as to plead in abatement: where it is said in an action by a corporation or a natural body, misnomer of one or the other goes only to the writ; but to say that there is no such person *in rerum natura*, or no such body politic, this is in bar, for if he be mishamed, he may have a new writ by the right name; but if there be no such body politic or such person, then he cannot have an action. 22 Ed. 4. 34. Here there was a corporation of nearly the same name, and I think therefore on authorities, that the nonsuit was wrong.

BULLER J. The argument of locality will not here decide the question; the name in the declaration imports locality, as the Plaintiffs state themselves to be the mayor and burgesses of the borough of *Stafford*, only omitting the county of *Stafford*. This brings the case within the distinction laid down in *King's Lynne*; for there is a difference in omitting matter of substance, and mere matter of addition. If the variance can be pleaded in abatement, it cannot in bar. To make it pleadable in bar, it must appear that there is no such corporation. The Year Books are decisive.

HEATH J. I am of the same opinion. In 22 Ed. 4. 34. which was an assize by the Master, and brethren of the fraternity of the Nine Orders of Angels in *B.*, and the Defendant pleaded, that they were incorporated by the name of the *Master and Brethren of the Fraternity of All Saints, and the Nine Orders of Angels in B.*; the writ was abated, which shews that a misnomer may be pleaded in abatement, where the Plaintiff misnames himself.

ROOKE J. I think we ought not to be more strict than they were in the days of the Year Books,

Rule absolute.

May 26th.

7 T.R. 39:0
7 East, 56.
3 B&C P. 1. 40.
571.

If an order for
the delivery of
goods in the
hands of a third
person be given
to an uncertified
bankrupt
in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them.

FOWLER v. DOWN.

THIS was an action of trover brought by an uncertified bankrupt.

The Plaintiff had carried on business for some time, and in a considerable way since his bankruptcy, and had advanced several sums

sums of money to one *Davidson*, in part payment of which *Davidson* gave an order for delivering to the Plaintiff fifty barrels of beef belonging to him, and then in the hands of the Defendant. The Defendant on demand refused to deliver up the beef so assigned by *Davidson* to the Plaintiff, on which this action was brought; and the cause being tried before *Eyre Ch. J.* at *Guildhall* at the Sittings in this term, a verdict was found for the Plaintiff with liberty to the Defendant to move to set it aside and enter a nonsuit.

Shepherd Serjt. having previously obtained a rule nisi for the above purpose, was this day called upon by the Court to begin in support of it.

Shepherd. The inference to be drawn from *Evans v. Mann*, C. 569. and *Martyn v. O'Harz*, C. 823. is, that property acquired by a bankrupt after the assignment becomes the property of his assignees: for in those cases there was no new assignment. In the first of them it was decided, that if a bankrupt sell goods previous to his bankruptcy, the assignees must sue the vendees *as assignees*: but where the goods are acquired and sold subsequent to the bankruptcy, they may sue in their own names. Though 13 Eliz. c. 7. s. 11. speaking of personal as well as real property coming to the bankrupt, at any time before payment of his debts, directs, that "they shall be bargained, sold, extended, delivered, " and used for and towards the payment of the said creditors;" yet the words "bargained and sold," can only apply to such property as does not usually pass without conveyance: and accordingly it is said by Lord *Hardwicke*, 1 Atk. 253. *ex parte Proudfoot*, "All the future personal estate is affected by the assignment, and "every new acquisition will vest in the assignees; but as to future "real estates, there must be a new bargain and sale." The 1 J. I. c. 15. s. 13. which is the next statute empowering commissioners to assign, operates only on *debts* due to the bankrupt. The case of *Chippendale v. Tomlinson*, B. R. T. 25 G. 3. *Cooke's Bankrupt Laws*, 260. was an action for work and labour done. Plea, that the Plaintiff was a bankrupt. Replication, work done after the commissioner's assignment for the necessary support of the Plaintiff and his family: rejoinder, no certificate: and demur to thereupon. *Lord Mansfield* said, "The assignees cannot let "out the bankrupt and contract for his labour." But there, if the bankrupt had recovered and reduced the damages into property, that property would have belonged to the assignees, as passing by the previous assignment. In order to support trover, there must be

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be right of property and right of possession: as to the latter, the Plaintiff never can have had it, for the goods have always been in the hands of a third person: and as to the former, the assignees have a right paramount. Neither can he be said to have had special property, for there is no case of special property, but where there has once been possession, as in the cases of a carrier or a bailee. Suppose the assignees were to sue us for the goods, could we plead a judgment recovered? The case of *La Roche Bart. and Others v. Wakeman and Others*, *Peake's N. P.* 140. is against us. But that went upon the same principle as *Ashley v. Kell*, *2 Str.* 1207. where it was held that an uncertificated bankrupt had such a property in future effects, as enabled him to transact and sell to a *bonâ fide* purchaser: which principle was questioned within these few days in the King's Bench (a), when the Court seemed to doubt whether an uncertificated bankrupt could give a title or maintain an action for any thing but the earnings of his labour. So in *Silk v. Osborne*, *Espinasse's N. P. R.* 1 vol. 140. where the action was for work and labour and materials found, Lord Kenyon said that the work and labour and materials were so blended together, as to become one joint cause of action: evidently confining it to the mere case of personal labour. If any claim by the assignees were necessary to prevent the bankrupt from maintaining his action, the distinction laid down between the produce of personal labour and other property would be nugatory: for the bankrupt might equally maintain an action in all cases, until a claim were made by the assignees.

Runnington Script. for the Plaintiff. In answer to the arguments on the other side I shall only advert to the cases on the subject. In *Chippendale v. Tomlinson* an uncertificated bankrupt was held intitled to recover for work and labour done. In *Silk v. Osborne*, which was an action for work and labour and materials found, Lord Kenyon said, "that however the question might be between the bankrupt and his assignees, it did not lie in the mouth of third persons to set up the Plaintiff's bankruptcy as a defence." In *Evans v. Brown*, *Espinasse's N. P. R.* vol. 1. p. 170. the same principle was extended to the case of money lent and advanced, where it was held that the loan being subsequent to the bankruptcy, the money might have been earned by the bankrupt after his bankruptcy; and that if the law allowed him to maintain an action to recover what was due to him for labour, he was equally intitled to

(a) See *Webb v. Ward and Another*, 7 T.R. 296.

maintain

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maintain one for the money so earned by his manual labour, which he might have lent to a third person. This would go the whole length of the present case, except as to the form of action. But it has been since expressly decided, that trover will lie by an uncertificated bankrupt, and that a defence of this nature does not lie in the mouth of a stranger. *La Roche Bart. and Others v. Wakeman and Another.*

EYRE Ch. J. What shall be done between the bankrupt and the assignees or creditors is one thing, and what between him and a stranger is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict. It is not true, that in cases of special property the party must once have had possession in order to maintain trover; for a factor to whom goods have been consigned, and who has never received them, may maintain such an action. But this is not a case of special property, it is a stronger case; it is entire property, though defeasible, or to speak more correctly, liable to be diverted. It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would be intitled to his action, because whether they have such claims or not is nothing to the stranger. I confess the theory of the case inclines me to go further. The bankrupt laws principally and most directly relate to that estate which the bankrupt had at the time of the assignment; there are provisions for taking the account and ascertaining the estate of the bankrupt at the time of the assignment; I recollect no such provision for the future effects; nor was it necessary, for where future effects are spoken of, they are supposed to be specific effects to be specifically conveyed by subsequent assignment, as was done in the case of *Tudway v. Bourne*, 2 Burr. 716. It is true, that unless the bankrupt's estate is sufficient to pay twenty shillings in the pound, the creditor will be intitled to a satisfaction for his debt out of effects acquired subsequent to the first assignment. But it cannot therefore be said that the property is not his own until such assignment, or that it is not his own because he is uncertificated. The operation of a certificate is simply to discharge the bankrupt from the old debts. A certificate is not like a pardon; it is not necessary to make him a new man. In my apprehension it could not be enough for a creditor or an assignee to say that he is uncertificated; even to intitle them to an assignment of future effects under the statute, they must shew that they have debts unpaid;

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paid; *a fortiori* a stranger ought not to take advantage of his being uncertificated, which affords but a presumption at most that there are debts unpaid. The bankrupt who has not obtained his certificate (which is all that is meant by the word uncertificated) stands on the footing of the 13 Eliz. c. 7.; by which, if the effects at the time of the bankruptcy are insufficient to satisfy the creditors, his future effects are made liable to be assigned. That is but in the nature of an execution and is reasonable, and the Court will give effect to the demands of the assignees or creditors, as long as any debts are due, in the mode pointed out by the statute, but I think not otherwise. The hardship and inconvenience, nay, the injustice, as it seems to me, of this disabling doctrine, is enough to condemn it.

7 Edw. 5. 56.

BULLER, J. This is clearly a case of property acquired subsequent to the bankruptcy. *Evans v. Mann* and *Martyn v. O'Hara* were questions between the bankrupts and the assignees; all the other cases agree very well with *Ashley v. Kell*. There the Court thought that the bankrupt had a property in goods acquired after the bankruptcy, and might assign to a *bona fide* purchaser. But the assignees may claim, and if they do, they shall succeed. So in *La Roche v. Wakeman*, Lord Kenyon said, "If the assignees take any steps to disaffirm the title, they may do so; but if they do not, the bankrupt being the ostensible owner, may convey a title, and it is not competent to third persons to object." Allowing that the assignees might demand the money, still it would be no bar to this action. Why? because a third person has treated with the bankrupt as capable of receiving credit. All the authorities go this length.

HEATH J. The 13 Eliz. c. 7. s. 11. directs that the future property of a bankrupt shall be "bargained, sold, extended, delivered, and used for and towards the payment of the creditors." The ancient practice was, for the commissioners to assign specific parts of the bankrupt's property to each particular creditor: and the 5 G. 2. is the first statute which directs the choice of assignees for the benefit of all the creditors. When it became the practice to make over all the property to the assignees, the general assignment was held sufficient to pass the future effects. But the question here is not whether the bankrupt can sell, but whether a stranger having purchased of him can dispute his title. He has a defeasible property, which none but the assignees can defeat. He is like an alien who may purchase lands and maintain an action for them, unless

unless the crown interpose. The assignees may allow the bankrupt to trade, and will have a right to recover the fruit of his contracts.

ROOKE J. I am of the same opinion. If a stranger is under any difficulty about defending himself against the assignees in a subsequent action, he has only to give them notice of the fact, and inquire whether they choose to defend it, and thereby he would be secured.

Rule discharged. (a)

(a) This case was afterwards confirmed by a similar decision in the *K. B.* See *Webb v. Fox and Another*, 7 T. R. 391.

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LOVERIDGE v. BOTHAM.

LE BLANC Serjt. having moved for the prothonotary's report in this case, it appeared that the Plaintiff had delivered a bill to the Defendant in 1793, for attorney's business done, previous to that time; in 1795 another bill was delivered for business done during the same period, into which many new items were introduced, and some of the former charges raised in amount. The prothonotary wished to be informed how far he was to consider the Plaintiff as concluded by the delivery of his first bill.

The Court said that the delivery of the former bill was conclusive evidence against an increase of charge on any of the items contained in it, and strong presumptive evidence against any additional items; but that if errors or real omissions in the former bill could be proved, they ought to be allowed for: and directed the prothonotary to review on this line of distinction. (a)

May 27th.

2 *Bof. & Pull.*
2 17.

Delivery of an attorney's bill is conclusive evidence against an increase of charge in a subsequent bill on any of the items contained in it: and strong presumptive evidence against any additional items.

(a) *Knox v. Whalley, Esp. Cas. N. P. 159.*

STABLES and Another v. ASHLEY and Others.

A RULE was obtained by Shepherd Serjt. on a former day, to shew cause why the proceedings in this action should not be set aside for irregularity. A *quare clausum frigat* having been sued out by the Plaintiffs against *Ashley*, *Frost*, and *Grignon*, and *Ashley*'s attorney served with a copy of the process, he searched the Filzer's Book, and found a memorandum (a) of a warrant of attorney in the action against all three, and accordingly on the 3d of May entered one joint appearance for them, though he had authority from *Ashley* only; on the 4th of May he was served with a notice

May 29th.

4 *Esp. 590.*
Anst. 19.
2 *New Rep.* 83.

In process not bailable, if the writ be joint and the declaration several, it is regular. *Sicut in bailable process.*

(a) 25 Geo. 3. c. 80.

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STABLES and
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Others.

of declaration; on the 5th he took it out of the office, and found that *Ashley* was the only one of the three declared against.

Le Blanc Serjt. for the Plaintiffs contended, 1st, That as it was not a bailable process, the proceedings were regular, and cited *Yardley v. Burgess*, 4 T. R. 697. in the note, and *Spencer v. Scott* decided in this term (b); 2^{dly}, That if there were any irregularity, it had been waived by the Defendants' taking the declaration out of the office; and 3^{dly}, That the Defendants' attorney was equally irregular with the Plaintiffs, having entered a joint appearance for all three, when authorised by one only.

Shepherd contra insisted that the writ and appearance being joint, and the declaration several, there was no process to warrant it; that the case of *Spencer v. Scott* went upon the possibility of the additional Defendant's being a fictitious person like *John Doe*, but here the service included all three; that taking a declaration out of the office is a waiver of irregularity in the process, because the Defendant is acquainted with that before he goes to the office, but not of irregularity in the declaration, for he must take out that before he can ascertain whether it be irregular or not: he added, that by the present mode of proceeding the revenue would be defrauded.

Per Curiam. The attorney has taken upon himself to enter an appearance for three, having an authority from one only; the Court therefore, if necessary, might cure the whole irregularity by setting aside the appearance as to two of the Defendants, and letting it stand for *Ashley* only. Unless we found ourselves bound by the strictest authorities, we would not countenance such an objection as this; but the practice seems against this objection; the distinction (c) is between process bailable and not bailable; in the latter a declaration may be delivered against one, though any number be mentioned in the writ, and no inconvenience can result from it; we will not distinguish between *John Doe* and a real Defendant, in order to raise an objection.

Rule discharged without costs.

(b) Suprà, page 19.

(c) *Holland v. Johnson*, 4 T. R. 695.

Holland v. Risbards and Gardley v. Bur-

ges, T. 32 G. 3. *ibid.* in Notes.

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Trinity Term,

In the Thirty-seventh Year of the Reign of GEORGE III.

NORTH qui tam v. SMART.

June 19th.

A QUI TAM action having been brought on the 20 Geo. 3.
c. 51. for sending in false accounts to the farmers of the
duties on post-horses;

Le Blanc Serjt. on a former day moved for leave to compound
on payment of 40s. to the Crown, and such duties as were defi-
cient in consequence of the fraud (which did not amount to 40s.)
together with the costs of the action to the prosecutor.

Shepherd Serjt. said he was instructed to consent.

But the Court seemed to doubt whether, as the deficient duties,
together with the costs of the action, would amount to more than
the 40s. paid to the Crown, the composition could be allowed,
and it stood over.

On this day *Le Blanc* mentioned it again, and said that he had
looked into the act, and found that the prosecutor was allowed
the full costs of suit; and therefore that the value of the costs
could not be considered as a part of the composition.

In compounding
a penal action on
the post-horse-
act, (which gives
costs to the pro-
secutor,) the
prosecutor was
allowed to re-
ceive the de-
ficient duties
(not amounting
to 40s.) and full
costs of suit,
though together
exceeding the
40s. paid to the
Crown.

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Accordingly, the Court gave leave to compound, and said that as the act was made for the benefit of the farmers of the post-horse duties, it was not unreasonable that they should make the composition on their own terms. Besides with respect to costs, this was not like other popular actions.

June 20th.

The Court will set aside a regular judgment, on an affidavit of merits, though bankruptcy is intended to be pleaded.

EVANS v. GILL.

MARSHALL Serjt. shewed cause against a rule for setting aside a regular judgment on an affidavit of merits, upon the ground that the Defendant meant to plead his bankruptcy. This is not more a plea of merits than infancy, coverture, usury, or the *Statute of Limitations*: and in those cases the Court has refused similar applications (a). Bankruptcy is not a meritorious, but a mere legal defence, against a conscientious claim; it is not such a discharge but that a previous debt may be a consideration for a new promise, as in cases of infancy, and the *Statute of Limitations*.

Sed per Curiam. Supposing this to be a fair bankruptcy, we should permit the party to make use of it as a defence; when he has given up all his effects, it would be cruel to charge him from a neglect in the attorney; the necessary consequence of which would be, that he must go to gaol. In all cases of fair bankruptcy, we think the party should have an opportunity of taking advantage of it.

Rule absolute on payment of costs.

(a) Vid. *Forbes v. Lord Middleton*, Str. 1242. and *Willett v. Atterton*, Bl. 35.

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BUCK, on the joint and several Demises of WHALLEY ^{June 22d.}
Clerk and Wife, v. NURTON.

THIS was an ejectment to recover sixty-four acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, tried before *Buller J.* at the last *Lent assizes* for the county of *Somerset*, when the Jury found a verdict for the Plaintiff, subject to the opinion of this Court upon the following case:

Edward Clarke, deceased, being seised (among other things) of the premises in question, did, by his last will duly executed, and bearing date the first day of *November* in the year of our Lord 1794, devise (amongst other things) as follows:

“ I give and devise unto my trusty and well-beloved friend *John Norton*, of *Milverton* in the county of *Somerset* aforesaid, “ Gentleman, (and who was acting for the testator, at his death, as “ his steward,) his heirs and assigns, all that messuage and farm “ called *Blagroves*, and the several pieces and parcels of land “ therewith held and enjoyed, situate, lying, and being in the “ parish of *Milverton* aforesaid, and now in the occupation of “ *Jonas Chorley*; also all that close, piece or parcel of meadow “ or marsh ground, called *Great Crook*, situate, lying, and being “ in the parish of *Bawdrip* in the said county of *Somerset*, and “ now in the occupation of *John and Richard Langdon*: to hold “ the said messuage or tenement and farm, lands, hereditaments, “ and premises, with their respective appurtenances, unto the “ said *John Norton*, his heirs and assigns for ever.”

Having then given certain legacies and annuities, he further gives and devises as follows;

“ I give and devise unto my good friend and relation *Elizabeth Whalley*, wife to the said *Thomas Sedgwick Whalley*, (the said *Elizabeth Whalley* being one of the coheirs of the testator,) “ all that my capital mansion-house wherein I now live, and the “ lands and grounds thereto belonging, and therewith held and en- “ joyed, with the appurtenances: and also all that my manor or “ lordship of *Chipley*, and all other my manors or lordships, “ messuages, farms, lands, tenements, hereditaments, and premises, “ as well freehold or fee-simple, as copyhold and customary, “ whereof I have a disposing power; except the messuage, or “ tenement, and farm, lands, hereditaments, and premises herein- “ before devised to the said *John Norton*, situate, lying, and

“ being

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“ being in the said county of *Somerset*, or elsewhere in the king-
 “ dom of *Great Britain*; to hold the same unto the said *Elizabeth*
 “ *Whalley*, for and during the term of her natural life, to and
 “ for her sole and separate use, with power for the said *Elizabeth*
 “ *Whalley* to cut and fell timber for the necessary repairs of the
 “ said premises only: and from and immediately after her de-
 “ cease, I give and devise my said capital mansion-house, manors,
 “ messuages, farms, lands, tenements, hereditaments, and pre-
 “ mises, with the appurtenances, unto the said *John Norton*, his
 “ heirs and assigns for ever: also I give, devise, and bequeath unto
 “ the said *Elizabeth Whalley*, all my leasehold messuages or tene-
 “ ments, lands, and premises, in the said county of *Somerset*, or
 “ elsewhere; to hold unto the said *Elizabeth Whalley* for so many
 “ years of my term, estate, and interest therein as shall run out
 “ and expire in her lifetime, to and for her own sole and separate
 “ use and benefit: and from and immediately after her decease,
 “ I give, devise, and bequeath the same leasehold messuages, or
 “ tenements, lands, and premises unto the said *John Norton*, his
 “ executors, administrators, and assigns, for all the residue of my
 “ term, estate, and interest that shall be therein then to come and
 “ unexpired. And it is my express will and desire, and I do
 “ hereby direct, that the said *John Norton* shall hold and enjoy
 “ my said capital mansion-house, with the appurtenances, for the
 “ space of one year next after my death. I give, devise, and be-
 “ queath unto the said *Thomas Sedgwick Whalley*, in case he shall
 “ survive his wife, the said *Elizabeth Whalley*, the sum of one
 “ thousand pounds, to be issuing and payable out of the estates
 “ hereinbefore devised to the said *Elizabeth Whalley* for life, and
 “ to be paid by the said *John Norton* at the end of twelve calendar
 “ months next after her death. All the rest, residue, and re-
 “ mainder of my personal estate and effects whatsoever and where-
 “ soever, and of what nature or kind soever, after payment of all
 “ my just debts, funeral expences, and legacies hereby given, I
 “ give, devise, and bequeath unto the said *John Norton*, his ex-
 “ cutors, administrators, and assigns. And I do hereby make,
 “ constitute, and appoint him, the said *John Norton*, whole and
 “ sole executor of this my will, hereby revoking all former wills
 “ by me at any time heretofore made; and do make and declare
 “ this to be and contain my last will and testament.”

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The testator died on the 28th of March 1796, having for many years previous to and at his death constantly occupied all the premises above mentioned, (which were enumerated in a schedule prefixed to the case,) with his said capital mansion-house, and the gardens

gardens and pleasure-grounds of *Chipley*, which include the par-lour-garden, the herb-garden, the pond-garden, the old house-garden, the arbour-garden, the shrubbery, the limetree-grove, and a court adjoining, and the public and private walks or road-ways, one of the latter of which was through the park to *Chipley House*, besides a back court, and other curtilages.

The question for the opinion of the Court was, Whether the lessors of the Plaintiff, or any of them, were entitled to recover all or any, and what part of the above-named premises; and whether they, or any of them, passed to *John Norton* by the clause which directs that he is to have the mansion-house, with the appurtenances, for a year after the testator's death?

Le Blanc Serjt. for the Plaintiff. The 1st question is, What is the true signification of the word "appurtenances?" the 2d, What is the intention of the testator, as it appears on the face of the will? The strict technical sense of the word "appurtenances" is confined to buildings, curtilage, and garden belonging to the house. In old times indeed, there was a question as to the latter. A devise of a messuage with the appurtenances, does not include lands usually occupied with the house: only such as are immediately necessary to the enjoyment of it. *Bro. Abr. Feoffment of Lands*, pl. 53. *Bettisworth's case*, 2 Co. 32. *Hearne v. Allen*, Cro. Car. 57. *Hutton*, 85. S. C. This last case was on a will, the two former were on deeds. But notwithstanding the general rule, if it appear to be the obvious intention of the testator, that lands generally occupied with the house should pass, the Court would construe the word "appurtenances" contrary to its strict technical sense, so as to carry the lands to the Defendant. The testator here was possessed of a mansion-house, together with parcels of land, amounting to about sixty-four acres and a half; there were gardens, shrubberies, public walks and ways, which might well come under the word "appurtenances," and it is not contended by the lessors of the Plaintiff that they did not pass: they were sufficient to satisfy the word "appurtenances," without the additional lands. The testator was well aware of the distinction between appurtenances to the mansion-house, and lands occupied with the mansion-house; for in every clause, except the last, (which is the one in question,) he describes the particular premises which are intended to pass, and afterwards adds the word "appurtenances." So in the devise to *E. Whalley* the words are, "all that my capital mansion-house wherein I now live, and the lands and grounds thereto belonging, and there-with held and enjoyed, with the appurtenances;" but in the

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last or directory clause, when he takes out of the devise to *E. Whalley* what was intended to be given to the Defendant for a year, he drops the words which describe the lands occupied, and says only, "mansion-house, with the appurtenances." Besides, it is to be considered that the Defendant had been steward to the devisor, and was by will appointed his executor; it was necessary, therefore, that he should have access to all the papers of the devisor, with as much facility as possible: this could be best afforded him by the devise of the mansion-house for a year, with what was necessary to its actual enjoyment; but a beneficial interest in the lands round it could not come within the same view.

Williams Serjt. for the Defendant. It is manifest from the will, that every thing was meant to pass. If that intent can be shewn, it is admitted that the words are large enough. But some cases may be cited, to shew that *ex vi termini* more will pass by the word "appurtenances" than has been stated on the other side. In *Higham v. Baker*, Cro. Eliz. 16. *Anderson* Ch. J. says, "That land shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years; for by that time it hath gained the name of parcel, or belonging, and shall pass with the house by that name in a will or leases." The same doctrine is laid down in *Loft v. Baker*, 2 *Rolle's Rep.* 347. So by the case of *Yates v. Clincard*, Cro. Eliz. 704. it appears, that lands may pass under the words, "house, with the appurtenances." In *Boocker v. Samford*, Cro. Eliz. 113. a devise of a "tenement, with the appurtenances, in which H.B. dwelleth in Ebley," was held to pass lands out of *Ebley*, which had been used with the tenement by the space of sixty years, and had always passed by one grant, and under one rent. And in the present case the lands in question had been for many years constantly occupied with the house. The strongest case in favour of the Plaintiff is *Smithson v. Cage*, Cro. Jac. 526.; but that was a case of surrender of copyhold, which is construed as strictly as a deed. But even there, the orchards were held to pass. By *Hill v. Graunge*, *Plowd. Com.* 170. it appears that the terms "appertaining to the messuage" may, even in a deed, signify lands usually occupied with the messuage (a). As to the question of intent, it has been said, that if the testator had

(a) Land may be said to be appertaining to an house, as well in the King's case, as of a common person, where it hath been let and occupied together by a convenient time. *Jennings v. Lake*, Cro. Car. 168. *Vide etiam Co. Extr. 384. Dyer. 362.*

meant

meant the lands to pass, he would have described them: and the circumstance of the description being inserted in the former clause, and omitted in the latter, has been relied on. But the words, "house with the appurtenances," in the directory clause, refer to the former description, and shew that the Defendant should take in the same manner as *E. Whalley*. The cases of *Doe v. Collins*, 2 Term Rep. 498. and *Blackborne v. Edgley*, 1 P. Wms. 600. prove that very little is sufficient to pass lands occupied with the house, where it appears to have been the intention that they should pass.

Le Blanc in reply was stopped by the Court.

HEYRE Ch. J. I have no doubt upon the case, unless it be with respect to the orchards. Lands will not pass under the word "appurtenances" taken in its strict technical sense: they will pass if it appears that a larger sense was intended to be given to it. If the Courts had always adhered to this line of construction, many reported cases would not now disgrace the books. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart* (a), there be demonstration plain of an intent to use them in a different sense. In the former part of the will there is a devise of a house with lands in terms express, to which is added, "with the appurtenances," in order to comprise all which might not fall within the description. Then follows a declaration that the Defendant shall have for one year something which was included in the above devise. The testator must be supposed to have understood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have used them. Suppose there had been nothing stated to let us into the intention of the testator, but the mere devise to the Defendant, we must have examined what was occupied by the testator; and if we had found a house situated in a park which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word "appurtenances" in a sense different from its technical sense. But this is not that case. It is true that the premises were occupied for a considerable time together with the house: but first, the whole of the premises are not necessarily connected; in the next place, there is here solid ground to argue, that the testator

(a) Hob. 33. The note is — No man shall by devise to an heir, any may take that is shew me a case in law, where by purchase not heir indeed, without declaration plain. understood

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understood the meaning of the words employed in the devise, having sometimes used the word "lands" as a part of the description, and sometimes dropt it. The Defendant being the testator's executor, and having been his steward, affords a fair ground of argument. The testator gave him the exclusive enjoyment of the mansion-house, "*with the appurtenances*," for one year only, after having devised the mansion-house and lands also "*with the appurtenances*," to Mrs. E. Whalley for her life, with remainder to the Defendant. Now with what view was this done? Most probably for the convenience of the Defendant in the execution of the duty imposed upon him. The general intent, therefore, as collected from the devise, and the relation in which the devisee stood to the testator, does not call upon us to go beyond the strict rule in construing the technical word "appurtenances."

HEATH J. I am of the same opinion. We ought to adhere to the strict technical sense of the word "appurtenances." For though the intention is not clearly expressed, why the Defendant should have the mansion-house at all, yet it appears, that he was executor and residuary legatee; and as such was intitled to the stock, the arrears of rent, the furniture, &c. A year's occupation therefore was given him, to settle his accounts, and collect what belonged to him. He ought to have the house, and what comes within the strict sense of the word "appurtenances." Besides, this may be distinguished from the cases cited, for it is a separation of the premises for a year only, whereas in some of the other cases it was for a great length of time, and in some perpetual, which might induce the Court to lean against it.

ROOKE J. I am of the same opinion.

The postea to be delivered to the Plaintiff
for all the premises except the orchards.

June 27th.

MORGAN Assignee of the Sheriff *v.* SARGENT one of
the Bail of OWEN.

If a declaration
on a bail-bond
conclude:

"Whereby an
action hath
accrued to the
Plaintiff to demand and have of the *principal*" (instead of the bail), and state non-payment by the *principal*; it is bad on a special demurrer.

THE declaration, after stating the writ, the arrest, the non-appearance, and the assignment of the bail-bond, proceeded thus: "By reason of which said premises, and by force of the statute, &c. an action hath accrued to the said T. Morgan as

"assignee,

" assignee, &c. to demand and have of the said *T. Owen* the said sum of 40*l.* above demanded. Nevertheless the said *T. Owen*, " although often required, hath not paid," &c. inserting *Owen's name* for that of the Defendant.

To this there was a special demurrer, assigning for cause that " it is not averred, or shewn in or by the said declaration, that the said *R. Sargent* hath been guilty of any breach of the condition; that it no where appears that the said *R. Sargent* hath neglected or refused to pay the money, or that payment thereof has ever been demanded of the said *R. Sargent*; and that no sufficient cause of action is any where stated or shewn to have arisen, or accrued to the said *T. Morgan* against the said *R. Sargent*."

Joinder in demurrer.

Shepherd Serjt. in support of the demurrer. It is consistent with the allegations in the declaration, that *R. Sargent* may have paid the money; the latter part of the declaration cannot be rejected, for there never was a declaration on a bail-bond ending with a statement of the assignment; and the Court cannot substitute *R. Sargent* for *T. Owen*.

Marshall Serjt. *contra*. The special demurrer ought to have alleged that the declaration had stated non-payment, by *T. Owen* instead of *R. Sargent*; and the averment in the beginning of the declaration, " owes to, and unjustly detains," sufficiently shews a cause of action and non-payment by the Defendant.

Shepherd in reply. The averment in the beginning of the declaration is a mere conclusion of law, and only shews that the debt was once owing; but the Plaintiff must shew how it is owing, and that there is a debt, and detainer at the time of the action brought.

Eyre Ch. J. Is it not shewn that the debt and detainer were existing at the time of the declaration, since the record begins with " was summoned to answer *J. M.* in a plea that he render to the said *J. M.* 40*l.* which he owes to, and detains," &c.? You must argue it as a mere point of form; if you attempt to argue on the substance, you must fail. This is a slip in form; but it is always the best way to make the party pay for this kind of slip, if advantage is taken of it by special demurrer. Infinite mischief has been produced by the facility of the Courts in overlooking these errors: it encourages carelessness, and places ignorance too much upon a footing with knowledge among those who practise the drawing of pleadings. The averment of " often requested" is an

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an established form, and I think a necessary form: had the Courts even determined it to be substance, I should have had no objection; for many actions might have been avoided, if request had actually been made. The party, if he will not amend, but will join in demurrer, must pay for his blunder.

The other Judges assenting,

Judgment for the Defendant.

June 28th.

SABINE v. ELIZABETH JOHNSTONE.

If a replication
to a plea in abate-
ment of the writ
begin, "that the
" said declara-
" tion ought not
" to be quash-
" ed," but con-
clude properly,
it is well enough;
for such words
may be rejected
as surplusage.

A SSUMPSIT.—Plea in abatement of the writ: That *Eliza Allen Johnstone*, who is impleaded by the name of *Elizabeth Johnstone*, was baptised by the name of *Eliza Allen*, and had always been called and known by the name of *Eliza Allen*, without this, that she had ever been called or known by the name of *Elizabeth*: and prays judgment of the writ. Replication: That the said declaration ought not to be quashed, by reason of any thing in the said plea above alleged: because the said *Eliza Allen Johnstone*, who now appears to the original writ and declaration, is the same person against whom the Plaintiff sued out his writ, and was at that time, and still is, called and known, as well by the name of *Elizabeth* as by the christian name of *Eliza Allen*. Concluding to the country. To this there was a special demurrer, assigning for cause: That the Plaintiff in his replication has not shewn any reason "why the said writ of the said Plaintiff, of which the said *Eliza Allen* hath above prayed judgment, should not be quashed: but on the contrary thereof hath alleged that his said declaration ought not to be quashed; to which said declaration the said *Eliza Allen* hath not pleaded, nor is she bound to plead; insasmuch as the said declaration cannot be good or sufficient in law, if the said writ of the said Plaintiff is quashed: and for that the matter alleged by the Plaintiff in his replication should, if true, have been pleaded in support of his said writ, and not of his said declaration," &c.

Joinder in demurrer.

Mayhall Serjt. in support of the demurrer. It is a principle in pleading, that the consequence intended to be drawn by one party must be excluded by the answer of the other. Here the Defendant says, that she is miscalled in the writ, and that it ought to be quashed. The Plaintiff in reply says, that the declaration ought not

not to be quashed, though the Defendant has not alleged that it ought. Suppose a judgment that the *declaration* should be quashed, yet the writ would remain, and then the Plaintiff could not bring a new action: for he must declare on the same writ as long as it remains. Now if he declared on the same writ, in the same manner, the same objection would lie; and if in a different manner, there would be a variance between the writ and the declaration.

Ramington Serjt. contra was stopped by the Court.

EYRE Ch. J. I think the rules of pleading ought to be maintained; but I cannot but consider this as a frivolous objection. The plea is right in praying that the writ may be quashed; and the replication is right: it is an answer by matter of fact, and not by matter of law: it states that the Plaintiff was called and known by one name as well as the other, and concludes to the country. If the Plaintiff had prayed judgment, "if the declaration ought to be quashed," it might have altered the case; but the answer on which the Plaintiff has relied, is an answer of fact. Then what is the consequence? If that fact had been tried, and found for the Defendant, the judgment would have followed the prayer of the plea. As to the beginning of the replication, it does not signify whether it says that the declaration or the writ ought to be quashed, or whether it says neither. If the Plaintiff had simply replied; That the Defendant was called and known, &c. and concluded to the country, it would have been sufficient, and the issue would have been well joined. It is therefore a surplusage form.

HEATH J. Of the same opinion.

ROOKE J. Of the same opinion.

Judgment for the Plaintiff.

MEDDOWSCROFT One, &c. v. SUTTON and Another, July 30.
Executors of BOWEN.

BOWEN was served with an attachment of privilege on a recognizance of bail, but died before the *quarto die post*; until which day he had time to surrender the principal; the Plaintiff then served the Defendants with an attachment of privilege, and before the *quarto die post* of that writ the principal was surrendered.

Shepherd Serjt. having obtained a rule to shew cause why the proceedings against the Defendants should not be staid, on payment of costs;

8 T.R. 423.
3 East, 307.
If bail be served with process on his recognizance, and die before the *quarto die post*, and fresh process issue against his executors; they have until the *quarto die post* of the second writ to surrender the principal.

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Cockell Serjt. shewed cause. The surrender was insufficient. *Bowen's* death made no difference: his executors could not be in a better situation than himself, and the principal should have been surrendered by the *quarto die post* of the first writ.

Shepherd Serjt. *contradictio*. The bail could not be fixed until the fourth day after the return of the writ; now he died on the first day: if he had lived he might have relieved himself; the executors therefore are not sued as the executors of bail fixed in his lifetime, and must be in the same situation as if no action had been brought against their testator. *Hoare v. Mingay*, 2 Str. 915. Though the staying proceedings on a surrender before the *quarto die post* was formerly *ex gratia*, it is now become a matter of right.

Per Curiam (after looking into the case of *Hoare v. Mingay*). The case in *Strange* has established this rule: That if the principal is surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient. The former suit was as much done away in this case by *Bowen's* death, as in *Hoare v. Mingay*, by the action being brought in the wrong court: the sufficiency of the surrender within the *quarto die post*, is a privilege to the party sued, to which the executors of the bail are as much intitled as the bail himself.

Rule absolute.

July 5th.

7 T. R. 391.
3 East. 561.
Post, 335.
2 Tenn. 229.

If an annuity-deed contains a proviso that the grantor shall repurchase, the memorial of such deed must state the proviso and the terms and conditions of redemption; if it only refers to the deed, and states the annuity to be redeemable "on such notice, terms, and conditions as are therein expressed," it does not sufficiently comply with the 17 G. 3. c. 26. s. 1.

Ex parte ANSELL and Another.

C. Ansell and *S. W. Fores* granted an annuity to *E. Boudton*, and gave a bond, warrant of attorney, and annuity-deed to secure it. The deed contained a proviso of redemption. The memorial stated the bond and warrant of attorney properly, but described the proviso of redemption as follows: "and in the same indenture is contained a certain proviso or agreement, empowering the said *C. Ansell* to repurchase the said annuity upon such notice, terms, and conditions as are therein expressed."

Williams Serjt. on the part of the grantors, on the first day of *Easter Term*, obtained a rule to shew cause, why the "bond, the warrant of attorney, and the deed, should not be delivered up to be cancelled."

The

The ground of his motion was, that the memorial had set forth the proviso of redemption in too general a way (*a*). He cited *Steadman v. Purchase*, 6 T. R. 737, to shew that a memorandum *indorsed on the deed*, importing that the grantor might redeem on terms, must be inserted in the memorial: and *Appleby v. Smith*, H. 37 G. 3. in *Scacc.*, where it was held equally necessary, though the proviso was contained in the *body* (*b*) of the deed.

Shepherd Serjt. shewed cause. Though it has been held that a proviso of redemption ought to be inserted in the memorial, it has never been deemed necessary to state it verbatim. A proviso of redemption is a part of the *consideration*, and there is a difference between the first clause which relates to setting out the *deed*, and the second clause which relates to setting out the *consideration*. The former requires the day of the month and year when the deed bears date, with other particulars to be specified; the latter only a general description. Unless this be sufficient, the whole deed must be set out; the days of payment and the remedy, as whether by distress or otherwise. The clause of redemption is stated generally, referring to the deed for particulars.

Williams in support of the rule. The proviso of redemption forms part of the terms of the agreement on which the annuity is granted: and there is no difference in sense, whether such proviso be totally omitted in the memorial, or only generally inserted, as in the present case. The deed is in the custody of the grantee; it is necessary therefore that the memorial should contain the facts essential to be known to the grantor. From this memorial he can only learn that he has the power of redemption, but not the terms on which he can redeem. If the

(*a*) Another objection to the memorial was taken by *Williams* Serjt. viz. that it was therein stated, that the consideration was paid by " *E. Boulton or her solicitor,*" in the alternative; and for this was cited the opinion of *Lord Longborough*, in *Duke of Bolton v. Williams*, 4 Bro. Chas. Cas. 309, where it is said, that " *the actual mode and manner of payment is necessary to be stated in the memorial;*" but this was agreed to be a mistake in the report: and *Hyde Ch. J.* said, " *That the deed must express by whom the consideration was paid, but not the memorial.*" *Vide also Delmer v. Bernard*, 7 T. R. 248.

(*b*) See also to this effect *Harris v. Shipton*, 7 T. R. 205. But where an

agreement was made at the time of the grant, that the grantors should have a power of redemption, which agreement was not then reduced to writing; but after the memorial had been inrolled, was indorsed on the bond; the Court of *K. B.* were of opinion that the third section of the act, which requires the consideration to be stated in every *deed*, &c. could not be extended to a power of redemption intended to be referred to the grantor. And though it had been objected for the Defendant, that such an agreement ought to have been stated in the memorial, the Court directed the counsel for the Plaintiff to speak to another point. *Delmer v. Bernard*, 7 T.R. 250.

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Courts have been right in insisting that the memorial must state the proviso, it ought also to contain the terms.

EYRE Ch. J. If the 17 Geo. 3. c. 26. had gone no further than the first clause, we must have looked to the import of the words of that clause; and the practice of the Register Counties. There they enter no more than a memorandum, containing the names of the parties, the dates, the premises, and perhaps the consideration. I do not know how *ex vi termini* or on analogies we can say that more was intended here. The Legislature has said what shall be inserted; namely, the date, the names of the parties, and for whom they are trustees, the witnesses, the annual sum, the name of the person for whose lives the annuity is granted, and the consideration or considerations. Now, unless under the word "considerations," I cannot say that the terms of the proviso are included. I should incline to go some length for the sake of general utility to decide that the terms must be set out in the memorial, but I doubt whether the act requires it. The word "considerations," in the act, may mean mere money considerations. In the case where the Courts have held it necessary to insert the proviso of redemption in the memorial, it has been indorsed on the deed: and has therefore been considered either as a separate deed, or as something collateral to the deed itself, and essential to be set out as a superadded part of the security. In the case of a proviso in the body of the deed, I doubt whether on the general idea of a memorial, or the specific description of it in this act, it need be inserted. I am not therefore prepared at present to consider this memorial as insufficient. It is a memorial only, not a copy of the deed: it states a deed for securing an annuity redeemable "on the terms therein expressed;" for which reference may be had to the deed itself. Is not this a sufficient compliance with the words of the act? He who sees an annuity redeemable, will inquire after the deed, and look into the terms. It has been stated that the act was made for the benefit of the grantor, who has parted with the deeds: I cannot subscribe to that proposition: it was made for the benefit of mankind in general, that the world might know the nature of such transactions, and the parties be restrained by a sense of shame from entering into them. The policy of the law would be amply satisfied by a memorial like the present; it answers all substantial purposes, for it cannot be necessary to load it with the full contents of the deed, which would be little short of requiring a copy. But if my Brothers should be of a different opinion, I should wish to take time to consider.

BULLETT

BULLER J. I have considerable doubts upon this question : and cannot quite coincide in the opinion of my Lord. I should sooner say that the proviso need not be inserted at all, than that it should be inserted in this general way. The question is, Whether the proviso be part of the consideration or not ? Look through the act. It was there intended to include *money* considerations only, and one clause actually says " in money only." If then the word "considerations" means money considerations only, a proviso is not within the terms of the act. But the point has been already settled, both here and in the *King's Bench*, and I am not disposed to disturb what has been settled by two determinations, though the act does not appear to go that length. Having got thus far, that the word "considerations" includes all the terms of the agreement, the remaining question will be, Whether the present proviso be sufficiently stated ? I admit no difference between the case of a proviso indorsed, and a proviso in the body of the deed. They are both parts of the agreement. So in a warrant of attorney with a defeasance, the defeasance is a part of the instrument. If then the proviso is to be taken notice of at all, is it not to be taken notice of substantially ? The act in my opinion was made for the benefit of the grantor, as well as the public. Let us see then if this memorial be sufficient to protect the grantor, against any improper advantages which might be attempted. He knows the annuity to be redeemable, but the deeds are in the hands of the grantee. Is it not then material for him to know the terms on which it is redeemable : as whether at the end of three or at the end of seven years ? Is it not of importance that he should have it in his power to prove all the material facts out of the mouth of the party himself : that he may be able to come to the Court, state the specific terms, and demand the deed on compliance with the proviso ? The terms therefore not being inserted, I think the proviso insufficiently stated, and if so, that the annuity should be set aside.

HEATH J. I have great doubts upon this question. There is no analogy between the register acts and the 17 G. 3. The former were made for the benefit of purchasers : the latter to throw a fence about the grantors of annuities, who are usually incautious and extravagant. What my Brother *Buller* has said appears extremely forcible, that the grantor ought to know the precise terms on which the annuity is redeemable : he would otherwise be left in great doubt and difficulty, unless he has kept a copy of the deed,

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deed, which is rarely done. As it has been held necessary to register a proviso, it must be shewn on what terms the proviso is to take effect: and I see no difference between a proviso inserted in the body of the deed, and one indorsed on the back of it.

ROOKE J. I am inclined to think the memorial insufficient. The proviso is a part of the consideration. Every circumstance in favour of the grantor is a part of the consideration; for all such circumstances form the ground of the grant, and if every such circumstance be a part of the consideration, it should be so specifically stated, that the grantor may know clearly what the terms of the agreement are. "On the terms therein expressed," is not a satisfactory statement. I think however that this matter requires further consideration.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

EYRE Ch. J. We have conferred with all the Judges on this question, and the result is, that we all think, that where an annuity is redeemable, the terms and conditions of redemption ought to be set forth in the memorial, in order that the party who is to have the benefit of such redemption, may without being driven to any compulsory means, be apprized of those terms and conditions, and may redeem it with most ease and convenience to himself. The consequence is that we must make

The rule absolute. (a)

P. 482.

(a) When this matter was first moved, Williams Serjt. stated that no action had been brought on the bond, nor any judgment entered up on the warrant of attorney, but cited *Ex parte Chester*, 4 T. R. 694. to shew that the Court had nevertheless a jurisdiction. The Court said "that every warrant of attorney entered was subject to their cognizance, but that they could not in all cases order all the proceedings to be cancelled, because they were void by the 1st section of the act." So in *Duke of Bolton v. Williams*, 4 Brown Chan. Cas. 310. and 2 Ex. jun. 154. Lord Loughborough said, "The courts of common-law, which will upon their general jurisdiction

enter into the validity of the warrant of attorney or judgment upon motion, in the particular application under the act, will only set aside the judgment or execution, or vacate the warrant of attorney; but the jurisdiction does not extend to ordering the bond to be delivered up, and if ever done, it has been done inadvertently." Qu. therefore, Whether the rule in the present case was not made absolute in the form in which it was moved through inadvertence?

See these cases collected and digested in *Hunt on the Annuity Act*, 2d Edition, published 1796.

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JOHN SCOTT v. GODWIN.

THIS was an action on a covenant contained in a lease, by which the Defendant had agreed to repair certain premises, of which he was tenant, at his own costs and charges.

The declaration stated in substance as follows:—That one *Thomas Grice* was seized of the reversion of the premises in question in his demesne as of fee, subject to a mortgage term of 500 years, which term was subject to be defeated, and was defeated before the making of the indenture thereafter next mentioned; that by an indenture made between the said *Thomas Grice* and the Defendant, the said *Thomas Grice* demised the premises in question to the Defendant for a term of twenty-one years; that the Defendant covenanted to repair at his own costs and charges; that the Defendant entered, and became possessed, and that the said *Thomas Grice* was seized of the reversion in his demesne as of fee; that being so seized, the said *Thomas Grice* devised the said reversion to his son and died: that the son together with certain persons having mortgage claims upon the premises by lease and release conveyed the said reversion to *John Scott* and *Robert Scott*, “to have and to hold the same unto the said *John Scott* and *Robert Scott*, to the only proper use and behoof of the said *John Scott* and *Robert Scott*, and the heirs and assigns of the said *Robert Scott* for ever, but nevertheless as to the estate and interest of the said *Robert Scott*, his heirs and assigns therein, in trust for the said *John Scott*, his heirs and assigns for ever. By means of which said premises, the said *John Scott* became, and was, and still is seized of and in the said reversion in his demesne as of fee,” &c. That although *John Scott* had ever since the said reversion came to him by assignment as aforesaid, kept the covenants on his part, yet the Defendant had broken his covenant by delivering up the premises out of repair. Damages, &c.

To this there was a special demurrer, assigning several causes (which were afterwards abandoned) and joinder therein.

Shepherd Serjt. for the Defendant. I shall not argue the special causes of demurrer, but rely on a substantial defect on the record. The declaration is herein in the name of one, whereas the legal estate in reversion of the lands in question belonged to *John Scott* and *Robert Scott*, as joint tenants for their lives; and those in whom the legal estate in reversion is must bring the action. Now *John* and *Robert Scott* may be joint tenants for their lives, although

Robert

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1 Eng. 499.
5 Eng. 111;
1 B&F. 5 Pull.
465.
2 B&F. 5 Pull.
499.

The reversion of lands demised to the Defendant for years, is conveyed to *A* and *B*, and the heirs of *B*, in trust for *A* and his heirs: *A* declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of *B*, states himself to be “thereby seized of the reversion in his demesne, as of fee.” This is bad upon demurrer.

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Robert had a several inheritance. *Co. Litt.* 182. *a.* 2 *Black. Comm.* 181. It is true that the interest of *Robert Scott* and his heirs was in trust for *John Scott*; but that can make no difference in the legal estate, and *John Scott's* estate in severalty was merely equitable. It is said, *Co. Litt.* 180. *b.* "that jointenants must 'jointly implead, and jointly be impleaded by others.' Supposing them however to be tenants in common, still they must join in this action. *Co. Litt.* 197. *b.* There is a distinction between actions for realty and actions for personalty; in the former, the parties may sever, because each may recover his share; but in the latter, not. Here the covenant is for not repairing, in which case damages are to be given; and how shall each have his damages apportioned? But there can be no doubt of *John* and *Robert Scott* being jointenants, who were so made in order to bar *John Scott's* wife of dower. Besides *John Scott*, as assignee of the reversion, must bring his action of covenant under 32 *H. 8.* c. 34. and thereby stands in the same situation as the lessor.

The covenant therefore must be considered as being made to both *John* and *Robert*, which renders it impossible for *John* to bring this action alone.

Marshall Serjt. for the Plaintiff. First, I shall contend that *Robert Scott* is a mere trustee, introduced into the conveyance to preclude *John Scott's* wife from having her dower, and solely for the benefit of *John Scott* the *ceftuy que trust*; and it is now a settled rule of law that an estate in trust merely for the benefit of the *ceftuy que trust*, shall not be set up against him. This was laid down by Lord Mansfield, in *Lade v. Holford*, 3 *Burr.* 1416. 2 *Bl.* 428. *B. N. P.* 110. and *Goodtitle v. Knot*, *Coupl.* 46. and recognized by Lord Kenyon, in *Doe v. Staples*, 2 *T. R.* 696. Now the difference between the case in *Couper* and the present is, that the former was the case of a *ceftuy que trust* with a mere equitable title; this is the case of a *ceftuy que trust* having the *whole interest* in himself, and also being jointenant of the legal estate. Secondly, Supposing *Robert Scott* to have been a jointenant with an interest in the demised premises, and admitting, that regularly jointenants should join in personal actions affecting their joint interest, yet the Defendant can only take advantage of this irregularity by plea in abatement, *Com. Dig. Abatement*, E. 8. which cites *Bracton*, l. 5. *De Exceptionibus*, c. 25. "Competit etiam exceptio dilatoria tam ex persona alterius quam petentis; quia sine alio, agere non potuit per se, qui tandem juris habet quam ipse qui petit; ut sunt plures participes," &c., and then instances husband and wife, jointenants, &c.

So

So also *Fleta*, l.6. c.38. f.3. “Competit etiam tenenti exceptio dilatoria contrà petentem, cum solus petat, quod cum alio petere deberet; sicut unus vel una cohaeredum vel vir sine uxor, de re uxoriā:” and *Skin.* 12. *Anon.* This shews that it may be taken advantage of by plea in abatement; to shew that it must, *tid. Com. Dig. Abatement*, E. 12. “If one jointenant or joint-merchant sue alone, and it is not pleaded in abatement, no advantage shall be taken of it in evidence.” And so it was held in trover, *Skinn.* 640. *Dockwray v. Dickinson*; in trespass, *Deering v. Moor*, Cro. Eliz. 554.; in trover for injuries done to the inheritance, *Brown v. Hedges*, 1 *Salk.* 290. *Blackburn v. Grove*, cited *Cartth.* 63.; in trover by the assignees of a bankrupt, *Nelthorpe v. Dorrington*, 2 *Lev.* 113.; in an action on a statute, by one of several joint-owners of a ship, *Sands v. Child*, 1 *Salk.* 31. 3 *Lev.* 35. *Skin.* 361.; in trespass for seizing the Plaintiff’s goods, *L’Eglise v. Champanti*, 2 *Str.* 820.; and in debt on bond against one of several joint obligors, *Whelpdale’s case*, 5 *Co.* 119. *Cabell v. Vaughan*, 1 *Vent.* 34. 1 *Sid.* 420. S.C. 238. S.P. It appears that if the Defendant in such cases do not plead in abatement, but plead in chief, 3 *Bac. Abr.* 218. tit: *Jointenants*, either the general issue, 1 *Mod.* 102. per *Hale Ch. J.*, or even the fact in bar, *Hollingworth v. Afcue*, Cro. Eliz. 355. 461. 494. 544. or demurs, 1 *Vent.* 34. 1 *Sid.* 420. or even where the fact appears by the finding of the Jury, *Cro. Eliz.* 554. 5 *Co.* 119. *Harman v. Whitchlow, Latch.* 152. Sir *William Jones* 142. the Plaintiff must have judgment. If it appear in the declaration that there are other jointenants who do not join in the action, yet if it do not appear also that they are alive, the Defendant must plead in abatement. *Benyon v. Palmer*, 5 *Mod.* 73. 1 *Salk.* 31. *Cro. Eliz.* 544. 6 *T. R.* 766. So here it should have been averred that *Robert Scott* was alive, and pleaded in abatement; for nothing will be intended by the Court in favour of this objection. The only case in which it has been held that this objection may be taken on the general issue, is *L’Eglise v. Champanti*, and there the dictum of Lord *Raymond* is confined to assumpsit, which seems to be an innovation. Perhaps the Plaintiff here did not know whether *Robert Scott* was living or dead, and this a plea in abatement would have shewn.

Shepherd in reply. I shall pass by many of the cases cited, because they do not apply, and shall not agitate the question how far it is necessary to plead this matter in abatement on contracts in general. I contend that every person who brings covenant as

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assignee of a reversion, must state how the reversion comes to him; and therefore, as the Court on this record cannot see that the Plaintiff is assignee of the reversion, he is not intitled to their judgment. Suppose a covenant made by the Defendant with *John and Robert Scott* jointly, and an action brought by *John Scott* alone, the Defendant need not plead in abatement, because the objection would appear on the record, which differs from the case of jointenants in other contracts and in trespass. The case of *Eccleson and Wife, Executors, &c. against Clipsham*, 1 Saund. 153., is strong, to shew that one jointenant cannot sue alone on the covenant. If one joint-covenantee cannot bring an action alone, neither can one joint-assignee of a reversion; for the action not being founded on privity of contract, the Plaintiff must so state his title, as to shew that he may sue under the statute of *Hen. 8.* in respect of his estate. The Plaintiff should not have stated that *Thomas Grice* devised, &c. whereby he became seised of the reversion, for *John Scott* did not become seised, but *John and Robert Scott* jointly: he should have stated that *Robert Scott* was dead, whereby he became seised. The cases of joint-obligors are distinguishable from this, for there the objection does not appear on the record, and it is still the deed of the Defendant. As to what has been said, that the estate of a trustee shall not be set up against the *ceftuy que trust*, that rule will not hold in covenant, though it does in ejectment: if the Court could take notice of a *ceftuy que trust* in covenant, they might as well in every action on a bond assigned allow the assignee to sue in his own name, instead of that of the assignor.

Cur. adv. vult.

The opinion of the Court was this day delivered by *Eyre Ch.J.* The question on this demurrer (which is now to be considered in the nature of a general demurrer, the special causes having been abandoned) is, whether the Plaintiff has shewn in his declaration a title to sue as assignee of the reversion. That title is to be collected from the operation of law on the deeds which are therein stated. And I take it to be most clear, that the operation of law upon those deeds is to constitute *John and Robert Scott* joint-assignees. The effect of this is, that the Defendant's covenants became also by operation of law contracts with *John and Robert Scott* jointly; and that all causes of action to them, arising out of these contracts, must follow the nature of the contracts, and must arise to *John and Robert Scott* jointly. In fact *John Scott* has declared on a covenant made with *John and Robert Scott*, but has supposed himself

capable

capable of sustaining an action alone for the breach of it. Now that this is fundamentally wrong there can be no doubt; and the principle on which it is wrong was not denied in the argument: it is only the application of the principle to this particular case as it stands on the record, that is disputed. It has been argued, *first*, That *Robert Scott* appearing to be a trustee for *John Scott*, his title cannot be set up against the *ceftay que trust*; and *secondly*, That if it can, it must be by plea in abatement, and by that mode only. On the first of these points we have had no difficulty. It appearing by the Plaintiff's own shewing, that *Robert Scott* was made joint-assignee with *John Scott* (to which if it were necessary might be added) for purposes which require that the legal estate should remain in *Robert Scott*, we cannot by any presumption, or by any rule of law, take the legal estate out of him during his lifetime. It is not that the Defendant sets up the legal estate of the trustee against the *ceftay que trust*; but the *ceftay que trust* himself has set it up as part of his own title. On the second point we have paused: not in respect of any difficulty in deciding against the point as it was stated; but on a question which the reasoning in some of the numerous cases which were alluded to by my brother *Marshall* suggested: and which is this, whether on a general demurrer to a declaration of this kind, it can be intended in support of the declaration that the jointenant, not a party to the action, is dead: in which event the whole legal estate would unite in *John Scott*, and he alone might sue. In the great bulk of the cases where it has been holden, that if there are not proper parties to a record, advantage must be taken of it by a plea in abatement, the objection has been, that other persons ought to be made *Co-defendants* with the Defendant on record: and there is an essentia difference between these cases and cases where the objection is, that there are not the proper parties *Plaintiffs* in the suit. Many Plaintiffs can have but one right, having but one interest and one cause of action; which ought to be, and is indivisible, admitting of but one satisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be that a man should derive a several interest out of a joint obligation to himself and others, and that Plaintiffs could sue separately for their portions of one right, it is most obvious that it must vex and harass Defendants extremely. That this cannot be appears from *Slingsbie's* case, 5 Co. 18., and from the principle of those passages cited from *Co. Litt.* which shew that jointenants must plead and be impleaded jointly. Whereas in

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the case of Defendants, in respect of the satisfaction they are to make to the Plaintiff, it is exactly the same thing whether they are sued singly, or with others, for every individual Co-defendant is ultimately liable to the whole demand, and execution may be had against any one. In *Rice v. Shute*, 5 *Burr. 2613.*, Lord Mansfield says: "Every partner is liable to pay the whole; in what proportion the others should contribute is a matter merely amongst themselves." There is therefore more of form than of substance in the objection that others should be made Co-defendants: however, the writ shall abate that has not made all the parties Co-defendants, because the Plaintiff may have a better writ in the same cause; but the action shall not be barred, because the Plaintiff has in himself an absolute right to sue the Defendant. The Defendant can only insist, if he pleases, that the Plaintiff shall sue others with him; and this advantage he may waive, where the objection does not appear on the face of the record, and does waive in that case, unless he plead in abatement. Hence it is, that where one of several joint obligors is sued, and *non est factum* is pleaded, the better opinion is that a Defendant shall not be allowed to object that there are other co-obligors, for the deed is his (a), though it is also the deed of others. It is convenient that the obligors should all be sued together, and therefore the Defendant may plead in abatement; but it is not absolutely necessary, and therefore he cannot plead in bar; nor can he take advantage of the objection on the plea of *non est factum* after oyer. I do not mean to enter into the question, whether if the Plaintiff state in his own declaration that the bond was made by two, the Defendant cannot take advantage of it: but where the declaration is right upon the face of it, if there be no plea in abatement, the Defendant cannot take advantage of it afterwards. I admit that it has been established by many cases, that in assumpsit against one Defendant and non-assumpsit pleaded, evidence of a contract with more than one does not maintain the issue, on the ground that it does not follow the contract in the declaration; but I take the contrary to be now fully settled upon the grounds which I have stated, and upon very old authorities which are taken notice of in the case of *Rice v. Shute*, and apply with equal force in assumpsit as in other cases. In that case, which is the last on this subject, Lord Mansfield lays great stress on the difficulty under which Plaintiffs lie when they are to sue partners. They know, says he, whom they deal with, but

(a) *Whepdale's case*, 5 *Co. 119.*

they

they do not know who are the secret partners; a plaintiff may be nonsuited twenty times before he finds them all out, or may be driven to file a bill for a discovery; and therefore he argues that convenience and the ends of justice required that if a Defendant would object that others are concerned with him in the transaction, he should plead in abatement, and so tell the Plaintiff whom he was to sue. Certainly this reasoning has its weight as to co-partners, being made Co-defendants, but as to Plaintiffs it does not apply; they are under no difficulty of this kind; every Plaintiff knows who is concerned in interest with him; he cannot have a better writ given him by a plea in abatement than he might have had without it. In this, and in other respects, as I have already observed, the case of Plaintiffs and Defendants essentially differs (*a*); and I conceive the rule of law respecting them is, generally speaking, (with perhaps one (*b*) exception,) different. I take it to have been solemnly adjudged in several (*c*) cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone. In the last case it is common experience, that where a joint contract appears in evidence on the general issue, the Plaintiff is nonsuited; and there are many cases in the books, in which it has been held to be error for one co-obligee or one co-covenantee to sue alone. The consequence is, that the objection that it is necessary to plead this matter in abatement is ill-founded. But where it appears on the record that the Plaintiff has a better writ according to his own statement, why should the Defendant plead in abatement? the object of a plea in abatement is to introduce on the record some new fact, which can only be done in that manner; but where the fact appears in the declaration itself, what remains for the Defendant but to ask the judgment of the Court? It may be answered that the Defendant ought to plead the variance between the writ and the declaration; but there are cases which establish that it may be taken advantage of in error, which could never be, if it were pleadable in abatement of the writ. The first of the cases cited for the Plaintiff, which I turned to, was that of *Cabell v. Vaughan*, 1 *Vent.* 34.; as it is short I will state the words: "In an action of debt upon a bond against one, and it appears another was jointly bound with him, where-

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14 *Egat* 222.

(*a*) In *Barnard v. Kenworthy*, *B. R. H.* 24 G. 3. which was assumpit on a note, Lord Mansfield said; "If there are lets Plaintiffs that there ought to be, it goes to a nonsuit; if lets Defendants, it is only in statement."

(*b*) See *Addison v. Overend*, 6 *T. R.* 766. and *Kelgward v. Overend*, 7 *T. R.* 379.

(*c*) *Vernon v. Jefferys*, *Sir.* 1146. *Graham v. Robertson*, 2 *T. R.* 282. *Spencer v. Durant*, 1 *Show.* 8 *Bull. N.P.* 158. *Epp. N.P.* 304. *Cont. Isaac and Paget v. Hitchcock*, *Cra. Eliz.* 202. where it is said that if the Defendant plead in bar the Plaintiff shall have judgment.

“upon”

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"upon the Defendant demurs; but it was adjudged for the Plaintiff, for the Defendant cannot demur in such case, unless the other obligor be averred to be living, and also that he sealed and delivered the bond. *3 Cro. 494. 544. Ascue and Hollingworth's case, 28 H. 6. 3.* And if one be bound to two, one obligee cannot sue, unless he avers that the other is dead. In *B. R. 1651. 1068. Levit v. Stainforth.*" No notice was taken at the bar of this latter paragraph; it is certainly too material to be passed over in a review of the cases on this subject. As if for the very purpose of preventing the first part of the case from being misunderstood, it adds, that in the case of one of several co-obligees suing alone, a different rule prevails from that which takes place where one of several co-obligors is sued. And the rule is that which goes the whole length of deciding upon the only doubt which could be made in this case; whether on a general demurrer it could be intended that a co-covenantee was dead, in order to sustain the declaration. "If one be bound to two, one obligee cannot sue, unless he avers the other is dead." He must recover upon his own strength; he must shew that which is necessary to make out his title; having by his own shewing given the legal estate to himself and another, he must take upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he must *ever that he is dead.* The case of *Cabell v. Vaughan* is also reported in *1 Sid. 421.* by the name of *Chappel v. Vaughan*; and in the same book *238. Osborn v. Cuborn*, it is stated to have been laid down as a rule concerning the bringing debt on obligations, that if an obligation is made to three and two bring the action, they ought to shew that the third is dead. These cases admit of this answer, that though they state a rule, they do not state in what manner advantage is to be taken of it, which it may be said ought to be by plea in abatement. But the case of *Eccleslon and others executors of Castle v. Clipsham, 1 Saund. 153.* and *Slingsbie's case, 5 Co. 18. b.* are decisive on this head. In the first the objection was allowed in arrest of judgment, and the party driven to discontinue; in the last the objection was on error in the *Exchequer-Chamber*, and for that error the judgment was reversed. Now these cases were both in covenant, and so directly in point. Sir *Josiah Child's case, 1 Salk. 31.* which comes nearest to an authority for the Plaintiff, supposing the rule as laid down in *Salkeld* to be correctly stated, and to have been well considered, (which the report of the same case, by *Lewin*, who argued it for the Plaintiff, leads me to doubt,) is distinguishable from the present case, on the ground of distinction

taken

taken by Lord *Raymond* in *L'Eglise v. Champanti*, reported in *Sr. 820.* that it was a case in tort and not contract. There it is said that in assumpsit it might be taken advantage of at the trial, for it would not be the same contract, but in tort it ought to be pleaded in abatement. So of the late case of *Addison v. Overend*, 6 *T. R.* 766.; where it was held on great consideration, that after a general verdict on the general issue it was no objection in arrest of judgment, that in one count of the declaration it was alleged that the Plaintiff was the sole owner of a ship, and in another that he was a part-owner, *viz.* of a quarter of the ship: for that also was a case of tort and not of contract. It seems to have been supposed at the bar that *L'Eglise v. Champanti*, M. 12 G. 2. was the first case in which such a distinction was taken; but in *Docktray v. Dickenson*, *Skinn. 640.* it is pointedly said, "That the difference is where it is an action founded on a tort and not guilty pleaded, and where it is founded on a contract; for there it is non-assumpsit, because it is another contract, but the party may make a tort joint and several." In truth, till the case of *Rice v. Shute*, E. T. 10 G. 3. B. R. it seems to have been the usual course to nonsuit the Plaintiff, if on the trial in an action of assumpsit it appeared that the Defendant had a partner who was not sued, as it remains now the course to nonsuit the Plaintiff if he has a partner not made a Co-plaintiff. I am not called upon to inquire whether the rule in tort, to which it is said, 2 *Lev. 113.* *Nelthorpe v. Dorrington*, that Sir *William Jones*, a sound and able lawyer, accorded *hesitant*, be well established or not. If a tort in respect of joint property can be joint or several, it is very well; a breach of a joint contract with two or more cannot be joint and several. This Plaintiff could not sue alone, therefore we are of opinion that there must be

Judgment for the Defendant.

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5 East. 411.

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3 *East. & Pult.*
618.

THIS was an action of assumpsit; the cause of action arose at *Newmarket*, but the venue was laid in *Middlesex*, and the verdict being for 8s. 6d. only, and there being no certificate according to the 23 G. 2. c. 33.;

Marshall Serjt. on stating the above facts, and that the Defendant could prove an express promise to pay in *Middlesex*, obtained a rule to shew cause why a suggestion should not be entered on the

A Defendant is not liable to be sued in the county-court for a debt under 40s. not arising within the county, though he be resident therein.

roll,

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roll, that the Defendant was resident in *Middlesex*, and liable to be summoned to the county-court.

Le Blanc Serjt. shewed cause. The county-court has no jurisdiction where the cause of action does not arise within the county, and a plaint levied in that court must state the cause of action to have arisen within its jurisdiction, otherwise it is error. In *Welsh v. Troyte*, 2 H. Bl. 29. and *Tubb v. Woodward*, 6 T.R. 175. this Court and the Court of King's Bench refused to stay proceedings, though the causes of action were under 40s., upon the ground, that as the Defendant did not reside in the county in which the causes of action accrued, he could not be sued in the county-court.

Marshall in support of the rule. A Defendant is liable to be summoned to the county-court, if resident within the county, though the cause of action does not arise there. The *Statute of Gloucester*, 6 Ed. I. c. 8. restrains actions under 40s. to the county-court, but does not confine its jurisdiction to the limits of the county; and the object of the *Statute of Westminster* I. 3 Ed. I. c. 35. is to restrain particular jurisdictions within their proper limits, and yet it never mentions the county-court. In *Com. Dig.* tit. *County*, C. 5. *Jurisdiction of the County-Court*, there is no authority to shew that it is confined to causes arising within the county. If the Defendant's liability to be summoned to the county-court be traversed, he will give in evidence an express promise to pay in *Middlesex*. Besides, this not being an application to stay proceedings because the action is under 40s. but to enter a suggestion pursuant to a particular act of parliament, the cases cited on the other side do not apply.

Per Curiam. This is a struggle in the teeth of a solemn determination in both courts, and of the principle which governs every inferior court in this country. The rule must therefore be discharged, but as the action is a very shabby one, let it be without costs.

Rule discharged without costs.

July 5th.

JONES v. KITCHIN.

The plea de
injuria sed pro-
priis effugie tali-
usq[ue] a cogni-
tione for rent in
arrear, is bad up-
on special demurrer.

R EPLEVIN for goods and chattels. Cognizance, stating that the place in which, &c. was a house held by the Defendant, under a demise from one John Osborne, at a yearly rent of 42*l.* payable on the quarterly feast days;

days; that 31*l.* of the said rent was due in arrear, and unpaid to the said *John Osborne*, and that the Defendant as bailiff of the said *John Osborne* acknowledges, &c.

Plea in bar, *de injuriâ suâ propriâ alisque tali causâ*.

Demurrer thereto, assigning for causes, that the said Plaintiff hath in and by his said plea tendered and offered to put several and distinct matters in issue, that is to say, the holding and enjoying of the said dwelling-house with the appurtenances in the said declaration and cognizance above-mentioned, by the said Plaintiff; and hath also in and by his said plea denied that the said rent in the said cognizance mentioned was due, in arrear, and unpaid as in that cognizance is above alleged and contained; and for that the said Plaintiff hath also in and by his said plea tendered and offered to put in issue, as well the times and manner of the payment of the said rent as also the amount and quantity of the same; and for that the said Plaintiff should and ought in and by this said plea to have tendered and offered to put in issue one single fact only, to be tried by a Jury of the country, and to have relied on the same; and for that in the manner the same plea is above pleaded, no certain or single issue can be joined in the same; and for that the said plea is double, multifarious, and not issuable, and is also in various other respects defective, argumentative, insufficient, and informal.

Joinder in demurrer.

The Court inclining against the plea in bar called upon *Shepherd* Serjt. to begin in support of it.

Shepherd. Where two facts are necessary to make up one defence, neither of which is matter of record, the plea *de injuriâ suâ propriâ alisque tali causâ* is good; and so is the rule in *Crogate's case*, 8 Co. 66. b. 1st resolution. In *Chauncy v. Winde*, Ld. Raym. 700. this distinction from 2 Leon. 102. was taken in argument, that where the matter of record is but inducement to the action, a special answer is not requisite; and *Holt Ch. J.* thought the replication *de injuriâ* to a justification of trespass, under a warrant from the commissioners, by virtue of an act of Parliament, good. In *Robinson v. Rayley, Burr.* 320. Lord Mansfield says, "It is true you must take issue on a single point, but it is not necessary that the single point should consist only of a single fact." So here tenancy in the Plaintiff and rent in arrear are both necessary to intitle the Defendant to distrain. Though at common law the Defendant must have set forth his title, which would have precluded

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precluded the plea *de injuriā*, yet by the 11 G. 2. c. 19. s. 22. matter of title is excluded from the avowry, and nothing is to be set out but matters of fact, which in this case are tenancy and rent in arrear. If therefore this be not a good plea, the Plaintiff must either admit the Defendant's title to the land or the rent in arrear. The intention of the statute was only to shorten the pleadings, and the Defendant need not have stated by whom the demise was made, but the Defendant's having gone beyond the statute, makes no difference in the law. In a Precedent Book of Mr. J. Lawrence, there is such a plea as the present, and a note of his in the margin, stating that he demurred to it; but it was overruled. The Plaintiff might have traversed every fact in the avowry by leave of the Court, which leave is now become almost matter of right: the Court therefore will not oblige him to do that in a circuitous manner, which may be done more shortly by the present plea.

Marshall Script. contra. If this mode of pleading be good, the 11 G. 2. instead of conferring a favour on landlords, would produce an inconvenience: it would be better to avow as at common law, and have an explicit answer to one fact. This plea would put in issue, first, the holding, which if there be no privity of contract may involve the distrainer's title; secondly, the terms of the holding, *viz.* the amount and days of payment of rent; thirdly, that rent was in arrear; fourthly, that the distress was taken for that rent; and in the case of a cognizance, like the present, command. The 4th resolution in *Crogate's* case is decidedly against the present plea in bar; I admit that if the several matters put in issue make together but one defence, they may all be put in issue together, and then *de injuriā sui propriā absque tali causā* is proper. But when the Plaintiff makes title by his declaration to any thing, and the Defendant pleads something in destruction thereof or of the Plaintiff's cause of action, then the Plaintiff must reply specially, and not say *absque tali causā*, for *absque tali causā* goes to the whole plea. *Yelv.* 157. *Taylor v. Markham*, Cro. Jac. 224. S. C. 1 *Brounlow* 215. S. C. *Horn v. Lewin*, Fort. 233. *Salk.* 583. *Witnel v. Cook*, Cro. Eliz. 812. *Banks v. Parker*, Hob. 76. *White v. Stubbs*, 3 *Lev.* 307. 2 *Saund.* 294. S. C. In *Cockerill v. Armstrong*, the declaration was trespass for taking a gelding: Defendant justified as servant of J. S. who was seised in fee: replication, *de injuriā sui propriā absque tali causā*, and judgment for the Defendant. The case is shortly re-

ported in *Com.* 582. (1); but I will read to the Court the judgment of Lord Ch. J. *Willes*, as taken from his Lordship's note (a). It only remains to observe on the cases cited for the Plaintiff. That which was called a single point in *Robinson v. Rayley*, embraced several distinct facts, any one of which being negatived, would have entitled the Plaintiff to judgment; therefore the doctrine laid down there is directly contrary to the doctrine in *Crogate's* case, which, before that, was considered as the great land-mark. In *Chancery v. Winde*, the Court held the replication good, because the statute being a general one needed not to have been pleaded, and therefore could make no part of the issue: and in that case, as it is reported in 12 Mod. 580. Mr. *Eyres*, in arguing for the Defendant, admitted that where one claims common by prescription, rent by grant, goods by sale, &c. and so justifies as having an interest therein, there the Plaintiff must answer directly to the title, and not *de injuriā suā propriā*.

The Court understanding that such a plea in bar as the present had been used of late, took time to consider.

The opinion of the Court was this day delivered by
EYRE Ch. J. As a wish has been expressed by the Defendant's counsel, that this case should be disposed of within the term, we will not keep it on foot any longer, for the sake of giving a more formal judgment than is already prepared. It is only necessary to read *Crogate's* case, to be perfectly satisfied, that on the authorities and on the reason of the thing this plea in bar is bad. The second resolution in that case is, "That when the Defendant "in his own right, or as servant to any other, claimeth an interest "in the land, or to any common, or rent going out of the land, "or to any way or passage upon the land, &c. there *de injuriā suā propriā* generally is no plea. That if the Defendant justifieth as "servant, there *de injuriā suā propriā* in some of the said cases, "with traverse of the commandment, the same being made material, is good, &c. For the general plea *de injuriā suā propriā* " (which should be replication) is properly when the Defendant's "plea doth consist merely upon excuse, and upon no matter of

(1) And in 7 Mod. 247.

(a) By that note it appeared that the decision of the Court of C. B. pronounced by Lord Ch. J. *Willes*, was founded on the second and fourth resolutions in *Crogate's* case. His Lordship said, they did not rely on *Cro. Jas. 599*, because *absque tali causa* was there omitted; nor on *Cooper v. Monk*,

C. B. T. 1737, because that was an action for breaking and entering a house; but on what was said in *Taylor v. Markham*, *Cro. Jas. 224. Tel. 157. S.C.* and on the case *14 Hes. 4. 32. b.* there cited, and *Cro. Eliz. 812*. He said the Archbishop of Canterbury v. *Kemp*, *Cro. Eliz. 539*, was contradicted by *Crogate's* case.

"interest

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" interest whatsoever. And it is said *de injuriā suā propriā*, because the injury properly in this sense is to the person or to the fame: as battery, or imprisonment to the person, or scandal to the fame. There if the Defendant excuse himself upon his own assault, or upon hue and cry, there properly *de injuriā suā propriā* generally is a good plea, for there the Defendant's plea doth consist only upon matter of excuse." The third resolution is, " That when by the Defendant's plea any authority or power is mediately or immediately derived from the Plaintiff, there although no interest be claimed, the Plaintiff ought to answer it, and shall not reply generally *de injuria suā propriā*." Thus in this case, the rule is distinctly laid down, that the replication *de injuriā suā propriā* is only to be received, where the defence set up is matter of excuse, and not where it asserts any right or interest. Nor is that all; for if the defence turns on the plea of commandment, *de injuriā suā propriā* is not good, but the commandment must be answered. In the case of *Cockerill v. Armstrong*, Bull. N. P. p. 93. ed. 1790. which was trespass for taking a gelding, and the Defendant pleaded, that the place where, &c. was 100 acres, &c. that J. S. was seised in fee, and that he as his servant and by his express orders took the gelding damage feasant, it was held that the Plaintiff could not reply *de injuriā suā propriā absque tali causā*, for that would put in issue three or four things; but he must traverse one thing in particular. This case is right in point of authority; and I agree with the rule laid down, that where the excuse arises in part out of the seisin in fee of another, there *de injuriā suā propriā* is not to be received. But the reason is not, because it puts two or three things in issue; for that may happen in every case where the defence arises out of several facts, all operating to one point of excuse: the reason is because this plea is only allowed where an excuse is offered for personal injuries, and not even then, if it relates to any interest in land (and here an interest in land would make part of the issue) or to any commandment. It is right that this case should be brought within the general rules of pleading, otherwise the 11 G. 2. which was intended to operate for the case and benefit of landlords, would be turned against them: for before the making of that statute, the issue in replevin must have been confined to some one material point. If we were now to break in upon the rule so satisfactorily laid down in *Crogate's* case, we should confound all the rules of pleading. If we admit this plea in the present

present case, I do not see why we must not let it in, in *quare impedit*, and every other case. Let us stand by the rules of pleading, which if we infringe here, we may destroy altogether. We are all of opinion that this plea in bar is bad.

Judgment for the Defendant. (a)

(a) Vide etiam *Cockerill v. Armstrong*, v. *Heward*, and *Crowther v. Raybottom*, *Willis*, 99. *Cooper v. Moake*, ib. 52. *Bell v. Wardell*, ib. 202. 3 *Bur. 1385*. *Dugrelles* 7 T.R. 654.

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CAZALET v. DUBOIS.

July 5th.

A RULE having been obtained to shew cause why the issues levied under several distringas's should not be restored on the Defendant's appearance,

Le Blanc Serjt. insisted that the Defendant should be put under certain terms.

Heywood Serjt. *contra* relied on the words of the 10 G. 3. c. 50. s. 4. by which it is provided "that when the purpose of the writ " is answered, that then the issues shall be returned; or if sold, " what shall remain of the money arising by such sale, shall be " repaid to the party distrained upon."

Per Curiam. When a party stands out several distringas's, it is perfectly in the discretion of the Court, whether they shall order the issues to be returned; and as the Court has discretion as to returning the issues *at all*, they must have a right to impose terms. The words of the statute must be understood with a reference to the constant jurisdiction of the Court. This is a convenient rule, and may perhaps put an end to the practice of standing out distringas's.

Rule absolute on payment of costs, the Defendant undertaking to plead *instanter*, and take short notice of trial.

It is in the discretion of the Court to put a Defendant under terms, who moves to have the issues levied under several distringas's restored to him on his appearance, according to 10 G. 3. c. 50. s. 4.

BADLEY v. LOVEDAY.

July 5th.

COCKELL Serjt. having obtained a rule to shew cause why an attachment should not issue against the Defendant for non-performance of an award, though an action on the award was pending in the Court of *King's Bench*, he was now called upon to support his rule.

The Court will not grant an attachment for non-performance of an award, pending an action brought on the award; nor allow the attachment.

the Plaintiff to waive the action, in order to apply for

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Cockell. By 1 *Salk.* 73. it appears that a party may proceed both by action, and attachment on an award at the same time. Notwithstanding *Stock and Huggens v. Smith*, *Cases temp. Hard.* 106, 107. in a subsequent case, *Andrews* 299. a rule was granted for an attachment on the Plaintiff's undertaking to discontinue the action. The Plaintiff in this case is ready to waive the action, being too poor to proceed in it.

Sed per Curiam. We shall not allow him to waive the action, to enable him to make this application. He has made his election.

Rule discharged without costs.

8 T.R. 81, 83.

9 East. 228.

3 Town. 258.

If the furniture
of a coffee-house
be taken in exec-
ution by a cre-
ditor, and with-
out ever being
removed, be let
by him to the
keeper of the
coffee-house,
who becomes
bankrupt while
in possession of
it; the assignees
may seize it
under the

21 Jac. I. c. 19.
s. 11.

LINGHAM v. BIGGS and Another.

TROVER against the Defendants, who were the assignees of *Anne Munday* a bankrupt, for all the household furniture, and other articles belonging to a coffee-house.

This cause was tried before *Eyre Ch. J.* at *Guildhall*, Sittings after last *Easter* term.

Anne Munday, the bankrupt, was the widow of a person who had kept a coffee-house, and being indebted to the Plaintiff, gave him a warrant of attorney for 800*l.*, under which he entered up judgment, and took in execution the goods in question. They were valued by the sheriff at 337*l.* 13*s.* 6*d.* and thereupon a bill of sale was made out by the sheriff at that price, to *Thomas Lingham* the Plaintiff's brother, in trust for the Plaintiff. In June 1791, articles of agreement under seal were entered into between the said *T. Lingham*, the Plaintiff, and *Anne Munday*; by which the Plaintiff let the goods to *Anne Munday* at the yearly rent of 27*l.*, for four years, and she covenanted not to remove them from the coffee-house without the Plaintiff's consent. The deed contained a proviso, that the Plaintiff should enter and take possession on failure in the payment of rent. *Anne Munday* continued in possession of the goods beyond the four years, and until they were seized under the commission.

At the trial an objection being taken to the Plaintiff's recovery on the 21 *Jac. I. c. 19. s. 11.* the Chief Justice doubted whether this case were within it, and a verdict was given for the Defendant, with liberty to enter a verdict for the Plaintiff, damages 337*l.* 13*s.* 6*d.* if the Court should be of opinion that it was.

Adair

Adair Serjt. having accordingly obtained a rule to shew cause why the verdict should not be entered for the Plaintiff,

Cockell Serjt. shewed cause. The 21 Jac. being a considerable extension of the bankrupt laws, in favour of creditors, ought to receive a liberal construction. It differs from the 13 Eliz. which only provided against fraudulent conveyances: but this statute attaches on all goods left in the hands of a bankrupt, even without fraud, if the bankrupt has thereby obtained a false credit with the world. It was determined in *Stevens v. Sole*, cited 1 Atk. 170. *Cooke's Bankrupt Laws*, 229. that an ostensible possession of chattels by the bankrupt was sufficient to intitle the assignee under the 21 Jac. Now here Mrs. *Munday* had as full and ostensible a possession as possible: she had the use of the articles in question, and they were of a perishable nature. Possession of moveables imports property; and on that ground, a distinction is taken between a mortgage of realty and a mortgage of chattels: in the latter case the supposition of ownership can only be repelled by notice. In *Ryall v. Rolle*, 1 Atk. 165. Lord *Hardwicke* decided on the spirit, not on the words of the act, and thought that the 11th section ought to be governed by the preamble at the end of the 10th section. This case cannot be compared to that of a banker or a factor, because they are known to deal upon commission; nor to that of furniture in lodgings, which is known not to belong to the person in possession; therefore the world is not deceived. The case of *Bryson v. Wylie* (a),

Cooke's

(a) The Reporters have been favoured with the following note of the case of *Bryson v. Wylie*, which is something fuller than any already in print.

BRYSON v. WYLIE. H. 24 Geo. 3. B. R.—
TROVER for a Dier's Plant.

The cause was tried at the sittings after Michaelmas term 1783, at Guildhall, before Lord *Manfield*, when a verdict was found for the Plaintiff, subject to the opinion of the Court upon this case.

" That one *James Simpson* being possessed of the dier's plant in the declaration mentioned, by an indenture dated April 26th, 1781, made between *James Simpson* and the Plaintiff, after reciting that the Plaintiff in January 1780 sold " to *James Simpson* a plant, &c. for 165. " 6s. 6d. for which sum *Simpson* gave the Plaintiff two promissory notes, dated

" 19th January 1780; one for 82l. 13s. 6d. " payable the 6th January 1781, and the " other for 82l. 13s., the remainder of the " sum, payable 6th January 1782; and " also reciting, that when the first note " became due it was inconvenient for " him to pay the same, and that he pro- " mised, in consideration of the said notes " being given up to him, to assign over the " plant, &c. to the Plaintiff, to which the " Plaintiff agreed: it was witnessed that as " well in consideration of the Plaintiff's " delivering up the said notes, as also s.r. " to *Simpson*, paid by the Plaintiff, *Simpson* " did assign and deliver to the Plaintiff " the said plant, &c. to hold to the said " Plaintiff, his executors, administrators, " and assigns for ever. And alio further " reciting, that it had been agreed between " the parties that the Plaintiff should let " the said plant to *Simpson* for three years, " from Lady-day 1781, *Simpson* paying " the

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Cooke's Bankrupt Laws 234. is exactly like the one at bar: now that has been recognised as law, and still remains untouched. The more modern cases, where the rule has been narrowed, are distinguishable from that and from the present. In *Walker v. Burnell, Doug.* 317. the bankrupt held the goods for a special purpose, of which the general creditors had notice. In *Collins v. Forbes*, 3 T.R. 316. the timber was appropriated to a special purpose, and the bankrupt had not such an ownership as would give him credit with the world. So also in *Jarman v. Woolloton*, 3 T.R. 618. *Buller J.* says, "It is sufficient to

" the Plaintiff 8l. 5s. 6d. per annum for
" the use and occupation thereof, and ob-
" serving the covenants respecting the
" same: (these are covenants from *Simpson*
" for paying the rent quarterly, for keeping
" the plant in repair, and not affigning it
" without the consent of the Plaintiff) it
" was agreed that if *Simpson* should make
" default in any of the quarterly pay-
" ments, or in the performance of any of
" the other covenants, then the term
" granted should cease, and the said *Simp-
son* should deliver the said plant, &c. and
" it should be lawful for the Plaintiff to
" take immediate possession of the same.
" There is a memorandum that *Simpson*
" had put the Plaintiff into possession, by
" the delivering of one winch. That on
" the 5th July 1783 a commission of
" bankrupt issued against *Simpson*, and
" the Defendant was chosen assignee,
" who took possession of the plant as
" part of the estate and effects of
" *Simpson*."

The question for the opinion of the Court was, whether this case was within the statute of 21 James I. c. 19. s. 11. If not, the verdict to stand; but if it was, to be entered for the Defendant.

Wood for the Plaintiff. This is only a lease for years, reserving a rent payable quarterly. The question then is, Whether the assignees under a commission of bankrupt are intitled to the absolute possession of premises, of which the bankrupt had only a lease for years? This case is distinguished from all the authorities upon the subject; for in every one of them there was an absolute and complete sale. In this case the use of the chattel is only demised for a term, at a certain rent. The being in possession merely is not a sufficient ground to vitiate the whole transaction. In the cases of bankers and factors, the goods they may have in their possession do not go to the assignees. *Mace v. Cadell*,

Cowp. 234. and *Walker v. Burnell, Doug.* 320.

Law contr. This might probably be good between the contracting parties, but is certainly fraudulent and void as to the other creditors. It gives a false credit; for with respect to chattels, possession always imports ownership, *Mace v. Cadell*. In this case here is a fair, open, and notorious sale of these fixtures to *Simpson*; and afterwards there is a private resale and a lease, so that to the world he appears as the absolute owner. From such a transaction fraud may be presumed. But I do not think it is necessary for me to state a circumstance of fraud, in order to get judgment for my client. *Brown v. Heathcote*, 1 Atk. 161. *Ryall v. Rolle*, 1 Atk. 165, Ex parte *Flyn*, 1 Atk. 185. *Holl v. Gurney* in this term. (Since reported, *Cooke's Bankrupt Laws* 231.) In the business of a brewer and also of dier, the utensils, the vats, the tubs, &c. are the chief object of credit, and therefore this lease held out to the world an idea that *Simpson* was possessed of this plant, and procured him credit.

Lord Mansfield. I have no doubt that this is a new experiment to defeat the bankrupt laws. The law has said that a trader cannot mortgage his effects, and at the same time keep possession. What is the case here? He sells and keeps possession, and pays interest for the money. If this contrivance were suffered, it would open a door to avoid the statutes, and therefore it ought not to be allowed to prevail.

Buller J. The case of a banker or a factor does not come up to the present; for there by the course of trade they must have the goods of other people in their possession, and therefore it does not hold out a false credit to the world. But some of those exceptions apply.

Judgment for the Defendant.

" say

"say, that the husband had not the order and disposition of this property with the consent of the real owner, the trustee."

Adair Serjt. in support of the rule. All personal property of which a bankrupt has the possession, is not within the object of the statute. The legislature, not choosing to go that length, added the words "order and disposition," &c. "sale and alteration," &c. which words must be rejected, if the mere circumstances of possession and reputed ownership are sufficient. Indeed, if this were the case, job coaches and horses, and furniture in lodgings, would be brought within the statute. The act was not intended to interfere with any thing but the stock in trade, the possession of which necessarily implies the order and disposition, sale and alteration, &c.; for a trader who is left in possession of his stock, does acts every day which make him the reputed owner, and give him a degree of credit beyond what arises from the naked possession. All the cases cited for the Defendant, except *Bryson v. Wylie*, are cases of mortgage. In mortgages of realty the absolute property vests in the mortgagee, though the mortgagor continue in possession: but in mortgages of personalty it is otherwise; there the property is only pledged as a security, and the absolute ownership does not pass *de facto*, till default in payment of the money. The doctrine of specific liens agrees with this principle, where a person is always held to have parted with the lien when he parts with the possession. *Bryson v. Wylie* was a case of stock in trade and implements of a profession, which come so directly within the act as not to be taken out of it by any private agreement. Lord *Mansfield* there calls it, "a new experiment to defeat the bankrupt laws," which he would not have done if he had considered the act as extending to household furniture. The case of *Collins v. Forbes* was within all the mischief contended for: *Kent* was the ostensible and reputed owner, and all the arguments with respect to false credit were urged: there no visible alteration of the property took place; but here there was an act of notoriety; there was an execution by matter of record executed in the house, and therefore a visible alteration, both by law and fact. *Jarman v. Woolloton* is the strongest case for the Plaintiff; for the presumption of property in a husband is of course stronger than in a stranger; and the jury found a verdict for the Defendant as to the stock in trade, and for the Plaintiff as to the furniture.

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Marshall Serjt. on the same side.

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Cur. adv. vult.

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Another.

This day the judgment of the Court was delivered by EYRE Ch. J. This stood over, in order to give the Court an opportunity of looking into the case of *Ryall v. Rolle*: we were desirous of reading over that case, lest we should at all break in upon what was there so solemnly decided. In effect there were but two points then agitated, and resolved, 1st, Whether a mortgagee of goods were a true owner within the 21 Jac.; and much labour was employed and learned distinction taken between *Hypothecation* and *Pignus*, absolute and conditional sale, in order to shew that he ought not to be so considered; but by the unanimous opinion of the Chancellor and Judges it was ruled, that a mortgagee was to be considered as the true owner, in opposition to the reputed owner. 2dly, Whether the trustee of the partner of a mortgagor was to be considered as the true owner, and the mortgagor the reputed owner within the statute. But it is very obvious that neither of these points much affect the present case. Perhaps the cases which fall within the statute of *James* may be divided into two classes; 1st, Where goods not originally the property of the bankrupt are left in his order and disposition. In *Ryall v. Rolle*, Lord *Hardwicke* intimates a pretty strong opinion that the preamble should govern the eleventh clause, and confine it to cases where the bankrupt was the original owner; but in later times (a) the statute has been considered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his possession the goods of another person, they fell within the statute: this has formed a class of cases as clearly within the 21 Jac. as the first class. Many cases have certainly been taken out of this class by exceptions, as those of factors. Though *Ryall v. Rolle* goes no further than I have mentioned, yet thus far it may be made use of as an authority here, that it was assumed throughout the whole discussion, both by the Bench and the Bar, that the words goods and chattels in the statute were not to be confined to stock in trade or utensils. The words were there supposed to include choses in action, which might pass by an act of parliament, though they could not by a bill of sale. The case of an assignment by a bankrupt of a bond which he retains in his possession, and consequently of which he has the disposition, so that he may receive the money, shews how the words "order and

(a) *Mace v. Cadell*, C.wp. 232.

"disposition,"

"disposition," and "reputed owner," are to be understood. They are to be understood thus. Being allowed to have possession of goods under circumstances which give the reputation of ownership, brings the case within the statute; and it is fair so to consider them, because every man who can be said to be the reputed owner, has incidentally the order and disposition; not indeed between the parties, but as to general appearance. It is impossible for the world at large to inquire what accounts may exist between the parties: general credit with the world is all; if the party be the reputed owner it imports that he has the order and disposition, and that he may sell. Admitting that the words, "order and disposition, sale and alteration," might refer to such goods only as a party has in his shop, and ready to sell to customers, yet they cannot refer to the actual sale, as they seem to import; for if the goods are once sold they are out of the power of the assignees. The act supposes them to remain in the possession of the bankrupt, and because they remain there the assignees are allowed to take them. The words therefore must not have that absolute sense which they seem to bear, but must have a meaning consistent with the end proposed to be attained by the statute. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, order, and disposition within the meaning of this statute. We must suppose that he has done that which the act supposes; and certainly to hold a construction at this day, different from that of all the cases on this remedial law, could not be justified by the mere letter of the act. The question then comes to this, Can furniture be distinguished from other goods and chattels, to which the statute would extend? Now, I think it cannot, except so far as it may go to shew that this bankrupt was not the reputed-owner, did not appear to have, and therefore had not the order and disposition; and it was fairly admitted by my Brother *Adair*, that it was not worth while to go to another trial on that point: Mrs. *Munday* had been in such possession, that no Jury could have hesitated to pronounce her the reputed owner. That being admitted, I think it necessarily follows from her being the reputed owner, that she will appear to the world to have the order and disposition, sale and alteration, &c. She must clearly derive a credit from these appearances, and consequently if the owner allows her to retain the property, however fair that may be between herself and the owner, it must be a fraud upon the creditors.

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9 *Eas*, 233-4.

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It has been suggested that this doctrine would go to an inconvenient length, and it was said by way of instance, that no trader could go into a ready-furnished house, or hire horses on a job, because possession would create a reputation of ownership, and consequently the furniture and horses would be liable to be seized. I admit that possession is always evidence of ownership, and with nothing to oppose it, would create a reputation of it: but it is evidence which may be opposed, and so satisfactorily opposed as to destroy that reputation. Let us pursue this idea. A respectable tradesman residing in his own house in *London*, takes a journey for two months to *Brighton*, or some other seaport, and hires a ready-furnished house: all the world would say that he was the reputed owner of the furniture in the house in *London*, and not the reputed owner of that in the house at *Brighton*. So as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into other evidence to determine of what character the possession was. I have no apprehension of this doctrine going to an inconvenient length.

It has been suggested also, that most of the cases are cases of mortgage, and that they are not in their circumstances like the present. But when once it is determined that a mortgagee is an owner within the statute of *James*, they will be found to be the same in principle. Two cases have been principally relied on at the bar; that for the Defendant was *Bryson v. Wylie*, and that for the Plaintiff was *Jarman v. Woolloton*, which last happened to be a case of furniture, and was held not to be within the statute of *James*. I am unable to perceive in those two cases, or in *Collins v. Forbes*, any difference in the rule of construction with respect to the statute. They are cases where the circumstances to which the statute was applicable lead the Court to different conclusions: perhaps both of them were right; but it is sufficient to say that neither of them has any thing in common with the present case: possibly they would not govern other cases much nearer to them in circumstances than this. Notwithstanding *Bryson v. Wylie*, I can suppose that a dealer may be in possession of a plant, without being the reputed owner; I can also suppose cases where a trustee for a married woman permitting the husband to take possession of the goods and chattels, and to become the reputed owner to all the world, may lose those goods in consequence.

quence. We cannot argue from the circumstance of a dier being in posseffion of a plant, and being the reputed owner, that therefore this furniture shall be liable to be taken by the affignees; nor from the furniture being protected in *Jarman v. Woolloton*, that the furniture shall also be protected here. As to the case of *Collins v. Forbes* (a), we perfectly agree in that decision: because *Kent*, the carpenter, who was to do the work, was not, at the time he became bankrupt, in posseffion of the goods which were lying in the king's yard, and were in contemplation of law in the posseffion of the true owner, whoever he was. It was well observed by Mr. Justice *Buller* in *Walker v. Burnell*, that questions on the 21 Jac. have much more of fact than of law in them. I believe when once it is ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownership false credit arises: from that false credit arises the mischief: and to that mischief the remedy of the statute applies. This seems a fair and sound construction of the statute; and the present being confessedly a case of reputed ownership, and the other terms of the eleventh section being incidental to reputed ownership, we think the verdict proper.

Rule discharged. (b)

(a) On the decision in that case, see the opinion of Mr. Justice Lawrence, as reported in *Gordon v. the East India Company*, 1 T. R. 237.

(b) See *Manton v. Moore*, 7 T. R. 67. *Derby v. Smith*, 8 T. R. 82.

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REGULA GENERALIS.

IT IS ORDERED, that from and after the last day of this Term, every person who shall be admitted an Attorney of this Court (not being already an Attorney of his Majesty's Court of *King's Bench*, or a Solicitor in the *High Court of Chancery*, or in the *Court of Exchequer*), shall, before he be sworn, file with the Secondary his articles of clerkship, together with the affidavit of the due execution thereof, and also the affidavit of the due service under such articles, and of the notices having been given pursuant to a rule of this Court, made in *Trinity Term*, in the thirty-first year of His present Majesty's reign.

J. EYRE.
F. BULLER,
J. HEATH,
G. ROOKE,

Mr. Justice *Buller* was absent during the whole of this Term, from indisposition.

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS

AND IN THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

RIDOAT v. PYE.

Nov. 7th.

WILLIAMS Serjt. moved for a rule to shew cause why an award between these parties should not be set aside, on the ground that the arbitrator had not examined the witnesses on oath.

It being asked by Eyre C. J. whether the arbitrator was desired at the time by either of the parties to examine on oath, and answered by Williams, that his affidavit did not state that any objection was made to his omitting to do so,

Per Curiam. Then we shall certainly not make any objection now.

Williams took nothing by his motion. (a)

The Court will not set aside an award on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination.

(a) *Hall v. Lawrence*, 4 T.R. 589.

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Nov. 8th.

HASKINS v. MORRIS.

An order for the discharge of an insolvent under the Lords' act, s. 16. cannot be made by a Judge in term, though summonses were taken out in vacation, and the order only delayed till the beginning of term by an irregularity in the affidavits.

THE Defendant was taken in execution at the suit of the Plaintiff in the *Tholsey* Court at *Bristol*: during his confinement there, another action was brought against him in this Court by the same Plaintiff, to which he put in bail, was surrendered, and afterwards removed by *habeas corpus* to the *Fleet* prison. While in custody at *Bristol* on the first action, he petitioned and obtained his groats, which were regularly paid till his removal to the *Fleet*, but had been since discontinued.

An application having been made to *Heath J.* in the long vacation to discharge the Defendant under the 32 G. 2. c. 28. s. 13. three summonses were then taken out; and had the affidavits been regular, the Defendant might have been discharged before the term began: but having been delayed by sending to *Bristol* for the proper affidavits, he was brought up before *Buller J.* at his chambers, on a day in term; who doubted first, whether under the words (a) of the act, he had a power to discharge the Defendant out of execution in an action brought in the *Tholsey* Court at *Bristol*; secondly, whether, as the application to him was made in term time, he could consider himself as only carrying into effect the former proceeding before *Heath J.* in vacation (b), or whether the discharge must not now be by the Court.

The Court were of opinion, that as no order had been made, this ought to be considered as an original motion. And accordingly granted a rule *nisi*, which was afterwards made absolute without opposition.

Williams Serjt. for the Defendant.

(a) The words are, "If any failure shall at any time be made in the payment of any weekly sum which shall be ordered by any such Court to be paid to any such prisoner, such prisoner, upon application in term time to the Court where the suit in which any such prisoner shall be charged in execution was commenced, or shall have been carried on, or in the prison of which Court any such prisoner shall stand committed, on any

habeas corpus, or in vacation time to any Judge of any such Court, may by the order of any such Court or Judge be discharged out of custody on every such execution."

(b) See *Lease v. Parfitter*, Doug. 68. where an order for the discharge of a prisoner was made by *Willis J.* on the first day of Term, and *Ld. Mansfield* said, that it must be considered with a reference to the application which was made in vacation.

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HICKS v. RICHARDSON.

Nov. 8th.

THE parties in this case having submitted to arbitration, and if an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration and of making the submission a rule of Court, and to execute a release to the other party. After notice of the award made, the Defendant, in order to get it out of the hands of the arbitrator, paid the whole expence of the arbitration; then tendered the sum awarded, together with a release to the Plaintiff, and called upon him to pay a moiety of the expence of the arbitration and of making the submission a rule of Court, and to execute a release on his part; this the Plaintiff altogether refused.

A rule nisi for an attachment against him for not performing the award having been obtained by the Defendant,

Williams Serjt. shewed cause, and contended, That it was not competent to the Defendant to pay the whole expence of the arbitration, and then apply for an attachment against the Plaintiff for non-payment of his moiety; but that he ought to resort to another remedy.

Le Blanc Serjt. in support of the rule.

EYRE Ch.J. We shall accommodate the form to the substance of the thing, if we are satisfied that the Plaintiff has refused to pay his moiety of the costs. Shall we oblige the arbitrator to bring an action? Should we not have allowed *him* to say on this sort of application that the costs of the arbitration amounted to so much, and that by the terms of the award they were to be paid by both parties, and that this Plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case, the Plaintiff is bound to pay his moiety of the costs. He has submitted by a rule of Court to pay them, and the Court will enforce the payment by attachment. It is all matter of form whether the arbitrator himself applies for the attachment or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case, for the arbitrator to get the whole costs from the

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the Defendant by withholding the award, who may redress himself by one attachment, than for the Defendant to have an attachment against the Plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment against him, for the moiety of the costs of the arbitration. What a scene of litigation, expence and vexation might this strictness produce? Supposing no objections to the expences themselves, I think the attachment should issue.

BULLER J. My doubt is this. The money has been advanced voluntarily, and without application from the Plaintiff, and the Defendant comes for an attachment as grounded on the award. Being a mere voluntary payment on the part of the Defendant, I doubt whether the Plaintiff is strictly liable to an attachment. Suppose the arbitrator had awarded the expences of the arbitration to be paid by the parties jointly and not severally. — However, I am perfectly satisfied that no injustice will be done; the Plaintiff is certainly bound to pay some way or other: if therefore the Court are inclined to grant the attachment, I shall not oppose it.

HEATH J. I cannot consider this as a mere voluntary payment of money, since the Defendant could not have got the award out of the hands of the arbitrator till all the expences were paid.

ROOKE J. It is clear that one man cannot pay the debt of another officially. But in this case there is one circumstance on which I lay great stress. It was necessary to make the submission a rule of Court; at least the attachment is right to enforce the payment of half the expences of that proceeding. I do not like attachments on equitable grounds, and I think that the Court should be very strict in granting them. But since there is a legal ground as to part, and as it is the opinion of the Court that no injustice will be done, I shall not oppose the attachment.

EYRE Ch. J. added, that perhaps on strict legal grounds the arbitrator ought to have applied for the attachment to enforce payment of the costs of the arbitration, but that he was unwilling to force arbitrators to come into Court.

Rule absolute.

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HOLLAND v. PALMER.

Nov. 9th.
15 East, 251.

DECLARATION for goods sold and delivered, and common money counts. Plea, That after the cause of action accrued, and before the commencement of the suit, the Defendant became a bankrupt and obtained his certificate.

At the trial of this cause before Lord Kenyon at the summer assizes for Stafford, it was proved that Richard Pope, one of the creditors who had signed the certificate, had received ten guineas for so doing from one Griffiths the Defendant's brother-in-law, but without the privity of the Defendant. It was contended on the part of the Plaintiff that the certificate was avoided by this circumstance under 5 Geo. 2. c. 30. Lord Kenyon hesitated, but the inclination of his mind was that the certificate was void: and a verdict was accordingly found for the Plaintiff, subject to the opinion of this Court.

Adair Serjt. now moved for a rule to shew cause why the verdict for the Plaintiff should not be set aside, and a verdict be entered for the Defendant. He contended that the acceptance of a sum of money by a creditor as an inducement to sign the certificate, if without the privity of the bankrupt, did not vitiate the certificate so signed. He said the case of *Rolston v. Calze, Doug.* 228. cited *Cooke's B.L.* 351. contained an implication in his favour; for as the argument there turned on the knowledge of the bankrupt at a particular time, viz. the time of the allowance of the certificate by the Chancellor, it seemed to admit that if the bankrupt had not known it at all, the certificate would not have been void. He added, that if it were otherwise it would be in the power of an enemy to deprive the bankrupt of the benefit of his certificate by maliciously advancing money to a creditor.

BULLER J. It is no matter whether the bankrupt knew of the money being paid or not; it was a fraud on the rest of the creditors. One of the creditors has obtained money which ought to have been divided among all of them. By so doing he has obtained an advantage. Besides, the others may have been induced to sign by his example.

EYRE Ch. J. This has always been the impression on my mind, and I should have had no difficulty upon it at *Nisi Pruis.* do not feel the weight of the distinction between the party coming

If any one of a bankrupt's creditors, though without the privity of the bankrupt, be induced by money to sign his certificate, it is void.

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coming to the knowledge of the money paid just before the allowance of his certificate, and at any time before. The certificate is as improperly obtained, whether the bankrupt knows of the circumstance or not. My Brother *Buller's* observation is extremely striking. If a considerable creditor be induced by money to put himself at the head of the list, the majority in number and value may be obtained by that means; since others may be unwilling to refuse signing, when one of the most considerable has consented. The bankrupt is to have the benefit of the certificate, provided the genuine sense of the body of creditors appears in his favour; but if it is not the genuine sense that appears, the certificate is no longer that fair act which ought to have any effect. I should not, therefore, agree to the case which has been put, of money paid maliciously. I should think that a certificate so obtained would be bad; but the bankrupt would be at liberty to procure another. On this case I have no difficulty whatever.

HEATH and ROOKE, J. being of the same opinion,
Adair took nothing by his motion.

Nov. 10th.
B. & P. 236.

The Court will not stay proceedings till security is given for the costs, in an action by a foreign seaman serving on board an English ship.

JACOBS v. STEVENSON.

THE Plaintiff in this action was a foreign sailor, serving on board an *English* ship, and declared in trover for a chest.

Le Blanc, Serjt. now moved for a rule to shew cause, why the proceedings should not be stayed till the Plaintiff should give security for the costs of the action. He admitted, that the inclination (a) of the Court had been not to adhere to the general rule with respect to foreigners, in the case of seamen serving on board *English* ships, lest they might be discouraged from entering into our service: but contended, that the exception was confined to cases where they sued for their wages.

EYRE Ch. J. This motion cannot be supported in the case of any foreigner if he be resident in this country. Now the Court may assimilate the case of foreigners serving on board *English* ships, to that of foreigners resident in this country. Perhaps the present Plaintiff is serving on board an *English* ship bound to the port of *London*. He may, indeed, be a foreigner, but he is just as amenable to the jurisdiction of the Court as any *English* sailor in

(a) *Henschen v. Garrett*, 4 H. Bl. 383. and 384. n. 6.

the

the same situation. The same reasons which influenced the Court in their former decisions on this subject, will influence them in the present case.

Le Blanc took nothing by his motion.

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HIGGINSON v. NESBITT.

Nov. 10th.

ADAIR, Serjt. on a former day having moved for leave to enter up judgment in the first instance, on a verdict reduced by an award; the Court then thought that he could only apply for a rule to shew cause.

He now mentioned it again, and stated that it was the practice of the *King's Bench* to make the rule absolute in the first instance, and added, that the practice of this Court seemed to have been so considered in a case of *Higginson v. Bell*, in last *Trinity* term, where a like motion with the present was granted.

The Court upon this made the

Rule absolute. (a)

(a) *Vid. etiam Grimes v. Neib, Post 480.* a case entitled to the *postea* without any where it was held that the party was in such application to the Court.

JEYES One, &c. v. BOOTH.

Nov. 11th.

ADAIR, Serjt. obtained a rule calling on the Plaintiff to shew cause why the judgment entered up, and the *ca. sa.* issued in this case, should not be set aside with costs, on an affidavit stating, that the judgment was entered up on a warrant of attorney executed by the Defendant, when in custody in the *Fleet* prison, he having no attorney present on his behalf.

The facts were these: The Defendant being in custody for the debt of a third person, but being supersedable, was informed, that if he was superseded, he would be detained at the suit of the Plaintiff, who was an attorney: upon this he sent for the Plaintiff, who by his direction prepared the warrant of attorney in question; the Defendant took it into his hand, read it, and was proceeding to execute it, when the Plaintiff informed him that he must have an attorney on his part present at the execution; accordingly the Defendant went into another part of the prison and brought with him a person, who being asked by the Plaintiff whether he was an attorney, answered in the affirmative; he was then desired to explain the nature of the instrument to the Defendant; and the

If a Defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and therupon produces a person as such, in whose presence he executes the warrant of attorney; the Court will not set aside the proceedings thereon, because the person so produced by the Defendant was not an attorney.

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warrant was executed in his presence. It turned out afterwards that this person was not an attorney, but only a clerk to an attorney.

Le Blanc shewed cause and contended, that where a party produces a person as an attorney who in fact is not one, that party shall not be allowed to turn a Plaintiff round by saying that the warrant of attorney is not, on that account, properly executed.

EYRE, Ch. J. If on the Plaintiff objecting, that the warrant must be executed in the presence of an attorney on the part of the Defendant, the Defendant accepts the instrument, and takes upon himself to find out the person in whose presence he ought to execute it, the Court will not, for the purpose of such a motion as this, doubt that such person was an attorney. The present application is founded on an attempt to cheat the Plaintiff.

Per Curiam,

Rule discharged with costs. (a)

(a) *Vid. Bireb v. Sberland*, 1 T. R. 715. *7 T. R. 7. Fell v. Riley*, Corop. 281. *Wat-Crompton v. Steward*, 7 T. R. 19. *Gillman* *kins v. Hanbury*, 2 Str. 1245. *Burnes v. Hill*, Corwp. 141. *Hutson v. Hutson*, *Ward*, Co. Ca. Prac. C. B. 158.

Nov. 11th.

The Master, Wardens, and Commonalty of FELT-MAKERS v. DAVIS.

The Master, Wardens and Commonalty of a company, cannot sue for a penalty forfeited to the Master and Wardens, to the use of the Master, Wardens, and Company.

The 1st count in a declaration in debt for a penalty under a by-law, set forth the charter empowering the company to make by-laws, the by-law made and the breach of it; The 2d count, omitting the above par-

ticulars, stated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made," &c. and this count was on special demurrer held bad.

DEBT on a by-law for 20*l.* The 1st count in the declaration set out a charter of 19 Car. 2. incorporating the Feltmakers' Company, giving a power to the Master, Wardens, and Assistants to make by-laws, and directing that the Wardens should be chosen out of the Assistants. It then stated that a by-law was made imposing a fine of 10*l.* on every member of the company, who being chosen Renter Warden should refuse to take upon himself that office, to be paid to the Master and Wardens for the time being, for the use of the Master, Wardens, and Company; that the Defendant became a member of the company, was elected Assistant, and took upon himself that office, and was afterwards elected Renter Warden, which office he refused to serve, &c. whereby, &c. The 2d count and the breach were as follows: "And whereas also the said *William Davis*, so being a member of the said company heretofore, to wit, on, &c. at, &c. was indebted to the said Master, Wardens, and Commonalty of the art or

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mystery of Feltmakers of *London* aforesaid, in the sum of other 10*l.* which he as *such* member of the said company had before then forfeited to the said Master and Wardens of the said company *for the use* of the said society, under and by virtue of *a certain* by-law or ordinance of the said company before that time duly made, ratified, allowed, and approved, for having refused to take upon him, and for not taking upon him the office of Renter Warden of the said company, to which said office he the said *W. Davis* had before then been duly elected and chosen, to wit, at, &c. By reason of which last mentioned premises an action hath accrued to the said Master, Wardens, and Commonalty to demand and have of and from the said *W. Davis*, for the use of the said company or society, the said last-mentioned sum of 10*l.* so forfeited as last aforesaid, being the residue of the said sum of 20*l.* above demanded, to wit, at, &c. Yet the said *W. Davis* (although often requested) hath not yet paid the said sum of 20*l.* above demanded, or any part thereof, to the said Master and Wardens, for the use of the said society, or to the said Master, Wardens, and Commonalty, or to any or to either of them; but to pay the same or any part thereof to the said Master and Wardens, for the use of the said society, or to the said Master, Wardens, and Commonalty, or to any or either of them, he the said *W. Davis* hath hitherto wholly refused and still doth refuse to the said Master, Wardens, and Commonalty, their damage of 10*l.*"

To the 1st count the Defendant pleaded *Nil debet*, and to the 2d demurred specially, and assigned for causes, "That the ground of the supposed forfeiture in that count, alledged to have been incurred by the said *W. Davis*, is not set forth; and also that the said supposed forfeiture is there stated to have been incurred to the Master and Wardens of the said company, for the use of the said society, whereas the said Master and Wardens are not the Plaintiffs in the said action; and also that no power or authority, by custom or otherwise, is set out to warrant the making any by-law or ordinance to create a forfeiture by the said company; and also that the supposed by-law or ordinance in that count mentioned, is not mentioned to have been ratified, allowed, or approved of according to the form of the statute in such case made and provided; and also that no title is shown in the said Master, Wardens, and Commonalty, to the said supposed forfeiture; and also that the said count is too general, and does not set forth the supposed cause of action with sufficient certainty to enable the said *William* to defend himself against the same; and that the said

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count is in other respects defective and imperfect." The Plaintiffs joined in demurrer.

Clayton Serjt. in support of the demurrer. This is the first instance of such a count being brought before the Court. All the precedents state, in regular order, the different facts which bring the Defendant within the penalty. A declaration ought to contain such things "whereunto the adverse party may answer, and whereupon the Court is to give judgment." *Co. Litt.* 303. a. The first objection to this count is, that it does not set out the by-law, which is the ground of the forfeiture. The words here are, "by virtue of a certain by-law;" *non constat* that the by-law alluded to is a good one. To shew that any penalty is incurred under a by-law or statute, the party must be brought within the terms of that by-law or statute. In the latter case it is the common practice: and the Court will not be more favourable to a penalty under a by-law, than to a penalty imposed by the Legislature. As the by-law is not set out, the Defendant is deprived of the opportunity of taking the opinion of the Court on its validity. The second objection is, that it does not appear that the Feltmakers' company had any authority to make the by-law in question. In the Vintners' company v. *Paffey*, 1 *Burr.* 235. a plea setting up a by-law as a defence, and not shewing the authority of the Court which made it, was admitted to be bad. In *Com. Dig. tit. Pleader*, (2 W. 11.) it is said, "a declaration for a penalty of a by-law must shew a power to make, by-law made, and breach," and refers to 2 *Vent.* 243. 1 *Bro. Ent.* 170. There are many other precedents in *Brown* to the same effect; to which may be added *Lilly's Ent.* 153. The third objection is, that the liability of the Defendant is not stated. It is only averred that he was a member of the company, but in order to incur this penalty he must not only be a member of the company, but one of the assistants. The last objection is, that the Plaintiffs have no right to sue for the penalty. It is forfeited to the Master and Wardens, to the use of the Master, Wardens, and company. Now if a sum be forfeited to *A.* and *B.* what right can *A.* *B.* and *C.* have to claim it?

Per Curiam. As to the second objection, the power of making by-laws is incident to every corporation (a), either by the body at large or by a select part; and it is in the latter case only that the

(a) 10 *Co.* 31. a. *Norris v. Staps. Hob.* *Corrib.* 482. S.C. *Lord Ray.* 498. S.C. 211. *City of London v. Vanderc.* 5 *Mod.* *Holt* 431. S.C. 439. 12 *Mod.* 270. S.C. 1 *Sals.* 142. S.C.

power need be shewn (a). The Court of Lord Mayor and Aldermen, which made the by-law relied on in the plea in *1 Burr. 235.* was collateral to the company of Vintners; it was a different body, having no such necessary relation to the Vintners' company as the Court could take notice of judicially. As to the 3d objection the present defendant is stated to be "such member," i.e. that member which is before described in the first count.

Le Blanc Serjt. for the Plaintiffs. In old time it was necessary to state many things at length which are not now required. Thus *indebitatus assumpfit* for fines and tolls has been held good, *Mayor of Exeter v. Trimlet*, *2 Wilf. 95.* even on special demurrer. *Seward v. Baker*, *1 T.R. 616.* *Whitfield v. Hunt, Doug. 727. n.* The declaration in the Barber Surgeons of *London v. Pelson*, *2 Lev. 252.* appears to have been a general (b) *assumpfit* for the penalty of a by-law, and was held good on demurrer. It does not appear by the words of the general count that the present penalty is forfeited to the Master and Wardens to the use of the body at large. Even if it did, I submit that the party for whose benefit the penalty is forfeited may bring the action (c). If a promise be made to *A.* for the benefit of *B.*, *B.* may maintain an action on that promise. The Master and Wardens as such have no power to sue and be sued; the only way in which they could declare must be as individuals; one with an averment that he was at the time Master, the others with an averment that they were at the time Wardens. But if these individuals died, they could not sue by their executors.

EYRE Ch. J. The forfeiture in question is to be paid to the Master and Wardens, to the use of the Master, Wardens, and company. If the by-law is badly framed, it is the fault of those who framed it. If they have chosen to empower their Master and Wardens to sue, the Court cannot look any further: no regulation

(a) See the *King v. Lyme Regis, Doug. 158. 159.*

(b) It was observed by the Court that as the necessity of a *special* count was not the point on which the Barber Surgeons v. *Pelson* turned, all the necessary circumstances might possibly have been stated on the record, though they do not appear in the report. But on a reference to the record, *B.R. Pofch. 31 Car. 2. Rot. 428.* in the King's Bench treasury office, the declaration appears to be only a *general indebitatus assumpfit*, for a sum forfeited by virtue of a by-law of the company, &c.

(c) In *Marchington v. Vernon* and others, *2 Term. 383.*

Sittings at *Guildhall*, *Trin. 27 G. 3. B. R.*, which was *assumpfit* on a bill of exchange, by the holder against the Defendants (signees of the drawee), who had given a promise to the drawer that they would honour the bill, *Buller J.* said, Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. See *Comb. 219.; 8 Mod. 117.* also *Dutton v. Pool*, *1 Vent. 318. 332.* cited and relied on by Lord Mansfield in *Martyn v. Hinde, Cwp. 443.*

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with respect to the payment of the money by them to any other persons will vary the right of action. As to the case put at the bar, of a promise to *A.* for the benefit of *B.* and an action brought by *B.*, there the promise must be laid as being made to *B.*, and the promise actually made to *A.* may be given in evidence to support the declaration. The Master and Wardens may bring the action, and apply the money to the use of the company. They may sue in the same manner as the Chamberlain of *London* (*a*) does for the Corporation of *London*: and they would probably declare both in their natural and official capacities. But in truth this is but one of many objections. I think this count is perfectly new, and cannot be supported. I would go as far as possible to prevent loading the record with unnecessary matter: but if I find myself obliged to pronounce that the matter omitted is necessary, (and as at present advised it does appear so to me,) and that no reference is made to the by-law on which the forfeiture accrues, I must hold the count bad, unless a series of authorities could be shewn to prove the contrary. It is not stated in this second count, that the by-law under which the forfeiture accrued, which is the ground of that count, is the same by-law as that mentioned in the first count: it only says, "by a certain by-law." Now if we cannot refer to the first count in order to get at the constitution of the Corporation, which is to determine where the power of making by-laws resides, and that the by-law in question was actually made according to that constitution, this demurrer must prevail. I never yet saw a count on a forfeiture of this kind which did not state all these circumstances. It may not have been amiss to try if one of these general counts could be slipped into practice, but here unfortunately the blot has been hit. In the case of tolls, I suppose the Court proceeded on the idea that they were known to constitute a right of action, and calling them tolls generally was held sufficient. But in debt on bond, if the Plaintiff were to state generally in his declaration, that the Defendant "was indebted to him on a certain bond," it would not be good. This claim for a penalty under a by-law arises on something in the nature of a specialty. It is true that in *assumpsit* greater latitude is allowed: because after all it comes to a question upon evidence what legal consideration there is either to support or to raise the *assumpsit*. I must confess I think that it was an extraordinary proposition to admit, that these general counts were good in the cases of tolls and

(*a*) Vid. the Chamberlain of *London's* cited 1 *Wif.* 235. which was debt on a by-case, 5 Co. 63. and *Hollings v Hungerford*, law by the Chamberlain of *Bristol*.

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copyhold fines, and I wonder that the courts ever went that length.

Per Curiam,

Judgment for the Defendant.

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BAIL being brought up to justify, and it appearing on their examination that though they had no written indemnity, yet that they looked to the honour of the Defendant's attorney for being indemnified, who had said that they should not be sufferers;

Palmer Serjt. who opposed them, cited the rule (a) of Court Hil. 37 Geo. 3.

Le Blanc Serjt. for the Defendant.

The Court refused the bail, but said, that as this was pressing the rule to its utmost extent, they would allow the Defendant time to put in fresh bail.

The Court will reject bail who have received a verbal promise of indemnity from the Defendant's attorney; but will give time to put in fresh bail.

(a) *Hil. 37 Geo. 3.* "It is ordered that from and after the last day of this term no person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any Defendant or Defendant."

ants in this Court, if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for such Defendant or Defendants."

ROBERT ALMGILL and ISABELLA his Wife, Demandants v. JAMES BRADSHAW PIERSON the Elder, and JAMES BRADSHAW PIERSON the Younger, Tenants.

Nov. 16th.

Adair Serjt. on a former day obtained a rule to shew cause why judgment as in case of a nonsuit should not be entered up in a writ of right.

The tenants had been in possession since the year 1746; issue in the cause was joined *Trinity* term 1796; notice of trial was given at the *Lent* assizes 1797, when the grand assize was elected; but the demandants neglected to proceed to trial at the *Summer* assizes following.

Williams Serjt. on this day shewed cause. Though the 14 G. 2. c. 15. only makes use of the words "Plaintiff" and "Defendant," yet from the authorities and practice on the subject it seems admitted, that judgment as in case of a nonsuit may also be

had

Judgment as in case of a nonsuit may be entered up against the defendant in a writ of right; nor will the Court relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings.

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had against defendants. *Newman v. Goodman* (*a*), 2 Bl. 1093. 1110. The reason why we did not proceed to trial at the last *Summer assizes* was, that we shortly expected to obtain material evidence from *France*, viz. the Baptisinal Register of the elder *Pierson*, whose legitimacy was to be disputed. This case differs from all others, for where issue is joined on the right, any judgment is peremptory [*1*] and may be pleaded in bar to every other action on the same right. The estate in question is 3000*l.* a-year.

It was stated by *Rooke J.* that an application had been made to him by the tenants, for leave to examine a witness on interrogatories, who was going to *Naples* with her husband and child, to which the defendants refused to consent.

EYRE Ch. J. In a common case I should have been inclined to think the excuse set up by the defendants sufficient: but the measure which they mete to others we shall mete to them. When they had the staff in their hands they tried to put difficulties in the way of the tenant, and made them risk the loss of an important witness. It was the defendants who made the attack, and who ought therefore to have been prepared to substantiate their claim before they made it. I should be inclined to give more indulgence to the tenants than to the defendants, who come in this case to disturb a very long possession, on grounds which may perhaps be good, but which should be known to be good before the action is commenced. According to the defendants' own account this piece of evidence was a new discovery, and collateral to the only ground on which they were induced to commence the action? nor is there any reasonable probability for supposing that they will be able to proceed at the next assizes. I think the Court ought to adhere to the principle of a case (*b*) decided in last *Easter term*, where an application for putting off a trial was refused, because the Defendant had not conducted himself fairly and candidly.

HEATH J. I am of the same opinion. Having refused justice to others, the defendants are not in a state to claim any indulgence from us. Moreover, as the parishes in *France* are now suppressed, and the registers disordered, it is not very likely that the defendants will be able to obtain the evidence they want.

ROOKE J. I entirely agree with my Lord that those who make the attack ought to be very well prepared to support it. In what

(*a*) In that case however the rule for judgment as in case of a nonsuit had been made absolute without opposition, and the

only question before the Court was, whether the tenant was entitled to costs.

[*1*] F. N. B. 5 N.

(*b*) *Sandres v. Pittman*, ante 33.

passed

passed before me, I think the demandants behaved very ill. On general principles therefore, as well as on this particular case, I think they can claim no indulgence.

Rule absolute.

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10 East, 328.

2 New. Rep.

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SYMMERS v. WASON.

A RULE was obtained on a former day calling on the Plaintiff to shew cause why the proceedings in this action should not be set aside for irregularity, or why a common appearance should not be entered and the bail-bond be delivered up to be cancelled.

Shepherd Serjt. in support of the rule, now relied on the two following objections: 1st, The Defendant was arrested by the name of *E. Weston*, and the Plaintiff filed a declaration *de bene esse* against *E. Wason*, sued by the name of *E. Weston*, which he contended could not be done on bailable process, unless warranted by the Defendant's putting *on* bail above in a different name from that by which he was arrested. 2d, The *jurat* of the affidavit on which the Defendant was held to bail omitted to state the place where it was sworn.

Clayton Serjt. contra.

HEATH and *Rooke*, J^s. (absente *Eyre*, Ch. J.) overruled both objections, and

Discharged the rule.

Nov. 20th.

15 East, 599.

The Court of Common Pleas has no power to issue an original writ of *prohibition* to restrain a bishop from committing waste in the possessions of his see: at least at the suit of an uninterested person. *Sanc.* That no court of common law has that power. *Qn.* If the Court of Chancery has not?

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" *ENGLAND*, to wit. Be it remembered, that on the Morrow of the *Holy Trinity*, before the Right Honorable Sir *James Eyre* Knight, and his Brethren Justices of our Lord the King of the bench at *Westminster*, cometh *Thomas Jefferson*, in his own proper person, and giveth the Court here to understand and be informed, that whereas the Right Reverend *Shute* Lord Bishop of *Durham* now is and for the space of five years now last past hath been Bishop of *Durham*, and during all that time hath been and still is seised in his demesne as of fee in right of his bishopric of *Durham*, of and in a certain wood, or parcel of wood ground, called *Walkington East Wood*, in *Walkington* in the county of *York*, as belonging to and parcel of the possessions of his bishopric, containing divers, (to wit,) 192 acres and one rood, and wherein during all

the

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the time aforesaid, until the waste hereinafter mentioned, were large quantities of timber and wood growing, and in part whereof there are still divers large quantities of timber and wood growing; and that *John Lockwood*, Gentleman, now holds and during all the time last aforesaid hath held the said wood or parcel of wood ground called *Wallington East Wood*, as lessee or tenant thereof, under the said Bishop of *Durham*: And whereas by the law of this land, bishops, or their lessees or tenants, or any other person or persons by their or any of their licence or authority, ought not to commit waste in the wood or wood grounds belonging to and parcel of the possessions of the bishoprics of such bishops respectively; the said *Thomas Jefferson* farther gives the Court here to understand and be informed, that the said Bishop and the said *John Lockwood*, during the time aforesaid, agreed between themselves to fell the timber and wood growing in the said wood or parcel of wood ground, and to divide the money arising from the sale thereof between them in certain proportions; that is to say, one-third thereof to the said Bishop, and the other two-thirds thereof to the said *John Lockwood*; and in consideration thereof to permit, suffer, and authorize such timber and wood to be cut down, felled, and taken away by the vendees thereof to their own use; and the said Bishop and *John Lockwood* have also agreed to grub up, eradicate, and destroy the timber and wood growing on the said wood or parcel of wood ground, and to convert the ground and soil thereof into arable, meadow, or pasture; and the said Bishop and *John Lockwood*, or one of them, in pursuance of such agreement, have or hath sold the timber and wood growing in the said wood or parcel of wood ground to — *Leatham* and *William Briggs*, for a large sum of money, to wit, the sum of 3000*l.* to be therefore paid by the said — *Leatham* and *William Briggs* to the said Bishop and the said *John Lockwood*, or one of them; and in consideration thereof have permitted, suffered, and authorized the said — *Leatham* and *William Briggs* to cut down, fell, and take away to their own use, the said timber and wood; and by virtue of the said sale, permission, and authority, the said — *Leatham* and *William Briggs* have cut down, felled, and taken away to their own use, the timber and wood growing, in great part, (to wit,) 138 acres of the said wood or parcel of wood ground; and the said Bishop and *John Lockwood*, or one of them, have or hath caused the said last-mentioned timber and wood to be grubbed up, eradicated, and destroyed, in order

order to convert, and have in fact converted the ground and soil of the said last-mentioned part of the said wood or wood ground into arable, meadow, or pasture; and the said — *Leatham* and *William Briggs* have declared, that they will, and do proceed to cut down, fell, and take away to their own use, by virtue of the said sale, permission, and authority, the timber and wood growing in the residue of the said wood or parcel of wood ground; and the said Bishop and the said *John Lockwood* do intend to proceed in causing the same timber and wood in the said residue of the said wood or parcel of wood ground, to be grubbed up, eradicated, and destroyed, and in converting the ground and soil thereof into arable, meadow, or pasture. Whereupon the said *Thomas Jefferson* hereby humbly imploring the aid of this Court, prayeth a remedy and the writ of our Lord the King of prohibition, to prohibit the said Bishop, the said *John Lockwood*, and the said — *Leatham* and *William Briggs* from doing any further waste in the said wood or parcel of wood ground, by cutting down or felling the said timber and wood there growing, or by grubbing up, eradicating, or destroying the timber and wood there growing, or converting the ground and soil thereof into arable, meadow, or pasture. And it was granted, &c."

The circumstances under which the present application was made, as appeared from the affidavits on both sides, were as follow: The wood in question, of which Mr. *Lockwood* had been lessee under the late, and is now lessee under the present, *Bishop of Durham*, had, previous to the year 1793, been subject to certain rights of pasturage in the owners and occupiers of houses and lands in *Walkington*. About that time an act was passed for the inclosure of the wastes, open fields, and commons in *Walkington*, and *East Wood* was comprehended therein. In the affidavits in support of the rule, it was stated that at the time the above inclosure took place, assurances had been given by Mr. *Lockwood*, that the wood in question would not be cut down; but this was denied by those on the other side, and proof adduced of Mr. *Lockwood's* ever having exercised the right of cutting timber in *East Wood*. There was no denial of the agreement complained of in the suggestion, between the Bishop and Mr. *Lockwood* for cutting down the wood; but on the part of the Bishop it was sworn, that the wood was in a very decayed state; that seventy out of the 192 acres of which it consisted were to be replanted, which would

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would produce timber of greater value than the whole then standing; and that the residue being employed in husbandry would be for the advantage of the see. It appeared, moreover, that Jefferson, in whose name the application was made, was, with respect to the wood in question, an uninterested person.

In Trinity term, *Le Blanc* Scrjt. obtained a rule to shew cause why the prohibition should not issue, which was enlarged till this term; the parties undertaking not to fell any timber in the mean time.

Accordingly, in this term, *Shepherd, Heywood, Williams,* and *Palmer*, Serjts. shewed cause against the rule, which was supported by *Adair, Le Blanc and Cockell*, Serjts.

The counsel who opposed the rule, argued in the following manner: This question may be divided into three heads; 1st, Whether a prohibition to stay waste directed to a bishop, can issue out of any court of common law: 2dly, Supposing that any court of common law may grant it, whether it can issue out of the Court of *Common Pleas*: 3dly, Supposing the Court of *Common Pleas* to have the power, whether they will grant it under the circumstances of the present case.

1st, At common law waste could be committed by three persons only, tenants in dower, guardians in chivalry, and tenants by the curtesy, *Co. Litt.* 53. b. 54. a. 2 *Inst.* 299. and some have doubted as to the latter (a). By *Stat. Marlebridge*, 52 *Hen.* 3. c. 23. and *Stat. Gloucester*, 6 *Ed.* 1. c. 5. a writ of prohibition of waste was given against all tenants for life and tenants for years. The *Stat. West.* 2. 13 *Ed.* 1. c. 14. took away the writ of prohibition of waste in all cases, and substituted a writ of summons. 2 *Inst.* 389. By another clause of the *Stat. Glouc.* viz. c. 13. a writ of estrepelement pendente placito was given; but according to Lord Coke, 2 *Inst.* 328. that is to be sued out of the Court of Chancery, or the Court in which the plea is pending: several forms of this writ may be seen in the *Register*, 76, 77. which are not founded on the common law, but are all *contra formam statuti*; besides here, no plca is pending. After judgment indeed, a writ of estrepelement lies at common law, *Reg.* 77. *Reg. Judic.* 13. 2 *Inst.* 319. but it is equally obvious that such a writ does not apply to the present case. Again another prohibition (b) lies by the 35 *Ed.* 1. *Stat.* 2. *Ne rector proferat arbores in cæmeterio, &c.*

(a) *Reg.* 72, 73. *Bro. Abr.* tit. *Waste.* (b) For a precedent of this writ, see *pl.* 88. 2 *Inst.* 145. *F. N. B.* 56. *Tompson's Entries*, 240.

which

which notwithstanding what is said in *Liford's case*, 11 Co. 49. b., does not appear to be in affirmation of the common law, but an innovation. There is one writ, 2 Roll. Abr. 813., directed to the sheriff, to prevent an abbot from committing waste in the possession of his priory; this writ is *testa rege*, therefore out of Chancery; and a *scire facias* is added for the party to appear *coram nobis*: this therefore probably issued out of Chancery, returnable in the King's Bench, and is the only writ at all resembling that now moved for, and this issued at the suit of the King, who was the patron, and was directed to the sheriff and not to the party. Perhaps it was the writ alluded to by Lord Coke, 2 Inst. 299., which went to the sheriff to prevent waste, and which, he says, may be used at this day. The prohibition of waste directed to the party which lay at common law, having been taken away by the Stat. West. 2. the present motion cannot be supported unless upon some distinction in favour of the Crown.

This is an application for a prerogative writ, without any other foundation than the angry *dicta* (a) of Lord Coke, sitting in the King's Bench, and asserting the jurisdiction of that Court by throwing out an invitation to all the King's subjects to move for such a writ; and yet it is remarkable, that, in the course of 200 years, no person appears to have accepted the invitation. For his own opinion he had no other ground than a case in parliament which occurred 300 years before that time, viz. the Bishop of Durham's case, 35 Ed. I. (b) Rot. Parl. vol. i. p. 198. No. 46. That case seems to have been much misunderstood. Anthony Beak was then Bishop of Durham, of whom Lord Coke says, 4 Inst. 216. in the margin: "This was Anthony Beak of that state and greatness (c) as never any bishop was, Wolsey except." By a record of 33 Ed. I.

(a) In 1 Roll. 86. speaking of the writ of prohibition to a bishop, he says, "If any man will move it, I will grant it;" and in 2 Roll. 335. and 3 Buff. 91. "any one may have this writ against him (a vicar), *mais c'est le writ of the King.*"

(b) PETITIONES IN PARLIAMENTO.

A. D. 1306. 35 Edw. I. No. 46.

Ans. Bk.

Voule nostre Seigneur le Roy entendre que Sire Amroy Eveug; de Dorem wast & desfrut tut le Boys apurtaunt a sa Eglise en l'Eveche de Dorem p dous & vingt & neuveise garde & p mettre forges de fer & de plume & de arder Carbons. E etre ce il charge les bondes del Eglise p diversies

mises et taillages auxi bien des damages que le Prieur de Dorem & autre Gents ouint defrene vers lui devant les Justices ure Seigur le Roy pur trespas donnt ill est atteint, come d'autre manere de taillages, quil sount si empoveriz quil ne pount leur terre tenir douant si ure Seigur le Roy qe est avowe del Eglise avantdite ne y mette remedie l'Eglise avantdite sera disherite & empoverie en prejudice ure Seigur le Roy & de la Corone & du Chapitre de Dorem.

Response.—Ita responsum est. Inhibetur per breve de Cancellaria Episcopo & ministris suis ne faciant vastum de contentis in petitione.

(c) Vid. also *Stow's Chronicle*, p. 207.

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Rot. 101. cited by *Noy Attorney-General, Cro. Car. 253.* it appears that the Bishop of *Durham* pretended he had such privileges, that the King's writ ought not to run there, and because one brought the King's writ there, imprisoned him; and for this cause it was adjudged, that he should lose his liberties for his time. And we may collect from *Rot. Parl.* vol. i. p. 197. No. 39. (a) p. 205. No. 77. (b) which are both of the 35 Ed. 1. that the temporalities of the Bishop, together with the *regalis libertas*, were then in the hands of the King (c); for with the *regalis libertas* the temporalities passed, as the demesnes of a lord go with the manor, and the profits and rents of burgage lands with the borough, *Madox Firma Burgi*, p. 7. 251. Nor is this at all improbable, since the temporalities of the Bishop of *Norwich* were seized a few years before for a similar offence, as appears by *Trin. 21 Ed. 1. Rot. 406.* cit. *Cro. Car. 253.* If it be true that the King was in possession of the temporalities, we may suppose that the aid of parliament was called in to prevent so powerful a subject as *Anthony Beak* from committing waste on lands belonging to the Crown. The case of the Bishop of *Durham*, 35 Ed. 1., was probably a petition of the commons on the relation of the Dean and Chapter, to the King sitting in council, that is, the council of peers, and there-

(a) A. D. 1306. 35 Edw. I. No. 39.
Uxor Willi le Marechal.

Ad peticoom Beatrixis que fuit uxor Willi de Marechal petentis remedium super eo, quod cum Ricus patek ejus seofasset &c. et postmodum ten' illa deuenerunt ad manus Antonii Episcopi Dunelm' tempore cuius dictus Willus vir suus obiit, post cuius mortem sequebatur ad Epm exigendo jus suum qui nichil ei inde facere voluit p quod supplicat Domino Regi deficuit illa non habet aliam sustentacionem quod remedium et jus sibi fiat ne pereat pro defecitu. Et dicit quod dicta tenementa sunt in Werk in Tyndale infra libertatem et sunt in manu Regis famul cum aliis terris que fuerunt in manu dicti Epi infra eandem libertatem, &c.

(b) A. D. 1306. 35 Edw. I. No. 77.
Ballivus Epi Dunelm'.

Ad petitionem ejusdem Ballivi petentis remedium super eo quod cum Regalis Libertas Epatus capta sit in manu regis certis de causis, custos dicti Epatus impedit ipsum Episcopum quod non possit habere Curiam suam Baron' ficut alii liberi dicti Epatus habent, & etiam idem Custos levare facit blad. ad valenc. xl. ti de villanis dicti Epi pro sustentatione Coronatorum &

sub-ballivorum Regis ibidem, & non distingit aliquem liberum seu villanum in dicto Epatu pro hujusmodi sustentacione nisi tantummodo villanos dicti Epi. Et praeterea idem custos cepit in manum Dni Regis Burgum Dunelm', Derlington, Aukelond, Aoketon, & Gatithedev, & mercat' et tolnet' in dicto Epatu & tenet Curias ibidem & capit proficia & jam duo Brevia de recto pendent in Curia ipsius Episcopi & Ballivi sui nam possunt ingredi cur' predictam ad faciend' partib. & justiciam: Item dictus custos levavit in manum Regis manerium de Sadberg cum wapentach' eidem manerio pertinentem quodquidem manerium est de novo perquisit' de antecessoribus Domini Regis, & eit extra-num regali libertati dicti Epatus, &c.

Responso. — Ita responsum est, Mittatur sub pede sigilli Cancellar' ista petatio Robero le Brabazon & socii suis, &c. coram quibus judicium redditum fuit de regali libertate capienda in manum Regis, & ipsi super hoc ordinant remedium competentia quoad omnes illos articulos.

(c) In the account of this transaction in *Holinshed's Chronicles*, vol. 3. p. 315. it is said that the King levied tallages on the tenants of the see of *Durham*,

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fore having had the concurrence of the three estates, may be considered as an act of parliament (a). The order made was not declaratory of the common law, for the petition not only recites waste committed, but tallages levied on the bondsmen of the church to pay the damages which the Prior of *Durham* had recovered (b) in an action against the Bishop; and the writ in that case issued out of *Chancery*, not as a court of justice, but as the repository of the great seal, which was necessarily annexed to the writ; and Lord Coke must have been mistaken when he said, in *Liford's case*, 11 Co. 49 a. "that the parliament did refer him to the ordinary remedy of the common law by writ of prohibition in such case," since by the *Stat. of West.* 2. 13 Ed. 1. that writ (if ever it lay against a bishop) was taken away.

The accounts of the Bishop of *Durham's* case given by Lord Coke, when sitting in the Court of *King's Bench*, are variously reported in the books. In *Stockman v. Whither*, Mich. 12 Jac. 1 Roll. 86. he is made to assert "that the Parliament said that a prohibition ought to be granted out of the *King's Bench*, and that it was granted accordingly." And in a note in 2 *Bulst.* 279. of the same year and term that "on motion made, the prohibition was granted by the Judges of the *King's Bench*." But in the case of *Knowle v. Harvey*, 1 Roll. 335. he says, "that it was granted in Parliament." In *Stampe v. Clinton*, alias *Liford*, 1 Roll. 100. he is again reported to have said, "that it was granted in the *King's Bench*;" whereas in his own report of *Liford's* case, he cites the Roll in Parliament, "*inhabeatur per breve de cancellaria.*" In three books therefore he is reported to have affirmed that the writ in the Bishop of *Durham's* case went from the *King's Bench*; and probably he did so; but had reason to alter his opinion when he came to make out and publish his own report of *Liford's* case. If however we are to consider the writ in that case as a common law writ, perhaps these discordant accounts may be reconciled in this manner. Formerly the courts of common law could not grant any prohibition in any case, unless the party were in contempt of an original writ directed to him out of *Chancery*; which was not returnable either in the *King's Bench* or *Common Pleas*, but was directed to the Court or party prohibited: if notwithstanding such writ with *alias* and *pluries*, the Court or party persisted in doing that which was prohibited, an attachment *sur prohibition* issued returnable either in

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(a) Vid. 1 Bl. Com. 182. 4 Inst. 25.
(b) 4 Inst. 216. 1 Rot. Par. p. 169. No. 87.

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the *King's Bench* or *Common Pleas*. *Langdale's case*, 12 Co. 58. 38 H. 6. 14. abridged *Bro. Prohibition*, pl. 6. This was probably the original practice in all prohibitions. Afterwards these Courts on a fiction issued an original writ in prohibition to confine Ecclesiastical Courts within their jurisdiction; if the Judges of those Courts proceeded contrary to the common law, the Courts of *King's Bench* or *Common Pleas* allowed a suggestion to be filed that they had proceeded so and so, and supposed them in contempt, as if a writ had actually issued out of *Chancery*; and this may serve to explain the words in *Fitz. Abr. Attachment for Prohibition*, pl. 15. 2 Inst. 300. and 4 Inst. 99. "That the common law, which in those cases is a prohibition of itself, stands instead of an original." This fiction did not easily gain ground in the *Common Pleas*. *Broke*, who was himself Chief Justice of the *Common Pleas*, doubts it (a). In *Mich. 6 Jac. Langdale's case*, 12 Co. 58. it was debated in the *Common Pleas*, whether that Court could issue a prohibition to the Court of High Commissioners, when no plea was there pending, and it was resolved by *Coke*, Chief Justice, and the other Judges of that Court, that it might. And in the next year Lord Chancellor *Egerton* called together the Judges of the *King's Bench* and *Exchequer*, of whom he demanded whether the Court of *Common Pleas* had authority to grant any prohibition without writ of attachment or plea depending; and the above resolution was unanimously affirmed. 4 Inst. 99, 100. (b). And this seems to be now settled; for in *Bushell's case*, *Vaughan* 157. Lord *Vaughan*, speaking of the *Common Pleas*, said "all prohibitions for incroaching jurisdiction issue as well out of the *Common Pleas* as *King's Bench*." This view of the subject seems to reconcile Lord *Coke's* different *dicta* respecting the Bishop of *Durham's* case. For as the fiction did not extend to prohibition of waste, an order was probably made in Parliament, that a writ should issue out of Chancery, directed to the Bishop and his ministers, and this was the ordinary remedy out of Chancery; if the Bishop persisted, another writ was issued returnable in the *King's Bench*, and then, if he continued to waste, he was in contempt, in which case the ordinary remedy was by a writ out of the *King's Bench*. But on no ground can the Bishop of *Durham's* case be considered as an authority for granting an *original* writ in a Court of Common law.

(a) See *Bro. Abr. Prohibition*, pl. 17.

(b) See also 12 Co. 109.

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The first case in which the power of the *King's Bench* to issue an original writ in prohibition of waste was asserted, was *Stockman v. Wither*, 1 *Roll.* 86.; also alluded to in the anonymous note, 2 *Bulst.* 279. which varies from *Rolle* by saying, "We will grant it by the stat. 35 Ed. 1." As that however was founded on the idea that the writ in the Bishop of *Durham*'s case issued out of the *King's Bench*, contrary to the authority of the Parliament Roll, it must fall to the ground. Besides it is contradicted by a report of the same case under the name of the *Bishop of Salisbury*'s case, *Godb.* 239., where it was holden that though waste by a Bishop may be punished in the Ecclesiastical Court, that a prohibition will not lie; and the reporter cites 2 *H.* 4. 3. where *Thirning Ch. J.* and *Tirwit J.* maintain the same doctrine. *Vid.* also *Bro. Abr. Deposition*, pl. 1. The next case in order is *Knowle v. Harvey*, 1 *Roll.* 335. 3 *Bulstr.* 158. where a prohibition was granted to a vicar by the common law for cutting down trees; but from *Bulstrode* it appears that the trees were growing in the church-yard which would bring it within the 35 Ed. 1. "ne rector profernat arbores, &c."; moreover the writ was moved for by the churchwardens pending a suit between them and the Defendant, and might therefore have issued under the Statute of *Gloucester*. *Sacker's* case, 3 *Bulst.* 91. *Moor* 917. cited 1 *Roll.* 335. which comes next, was a prohibition against a vicar continuing in possession of the vicarage by consent of the parties after judgment against him, and was therefore either *pendente placito*, or founded on the writ in the Register, p. 77. *Coylard's* case, 2 *Roll.* 111. was only a prohibition to a vicar under 35 Ed. 1. and *Drury v. Kent*, *Hob.* 36. to an incumbent for waste while a *quare impedit* was pending. There is a case of the Lord of *Rutland*, 1 *Lev.* 107. 1 *Keb.* 557. 1 *Sil.* 152. which according to the two last reporters was an application for a prohibition to a rector, for opening mines in the glebe; according to *Levinz* for opening mines and cutting down trees; but from the record of the case, *Liber Placitandi* 246. the first account appears to be correct; the Court said, "that if it were grantable, no mines could ever be opened in the glebe;" but added "that for cutting down trees to the destruction of the church, they would grant it;" probably under the 35 Ed. 1. All the cases in the books have now therefore been disposed of, except a case of *Acland v. Atwell*, 2 *Roll. Abr.* 813. where a prohibition was granted to a patron against a prebendary for

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for cutting down trees, by Lord Keeper *Coventry*; that indeed is a very loose note, and though we cannot say on what grounds it was allowed in a Court of Equity, yet we contend that there is no authority for an original writ of prohibition out of a Court of common law.

Admitting however that a prohibition may be granted against a parson, there is nothing to shew that it can against a bishop. With respect to a parson the fee of the glebe is in abeyance; but the fee of the bishopric is in the bishop; the latter may join the mise in a writ of right. *Co. Litt.* 300. b. but the former cannot for the weakness of his title. *F. N. B.* 5. The seisin of a bishop may be compared to that of a corporation aggregate, and a prohibition might as well go against the one, as against the other; indeed 2 *H.4.* 3. shews that a bishop is not punishable for waste at common law: and in the Lord of *Rutland's* case, 1 *Keb.* 557. where a doubt was raised, whether a parson could open mines, the Court said, "he may well enough do it as *evesque*." Before the 13 *Eliz.* a bishop was so far seised in fee that he might alienate, and even after that time, till 1 *Jac.* 1. he might alienate to the crown.

2dly, At the division of the *Aula Regis* the power of the Court of *Common Pleas* was chalked out with precision. Its jurisdiction arises in consequence of original writs out of *Chancery*, returnable here. This appears from the words of *Bracton* 105. b. *fine warranto jurisdictionem non habet nec coercionem, &c.* and again *Bract.* 108. a. *justiciarii loquelas omnes de quibus habent warrantum terminantes, &c.* and from 4 *Inst.* 99. There are indeed some exceptions to this rule. This court may issue original writs, where their own officers are concerned; or where their own jurisdiction is to be protected from the infringements of Inferior or Ecclesiastical Courts. 4 *Inst.* 99. *Langdale's* case, 12 *Co.* 58. The latter right was formerly necessary to its existence; for the Chancellor and his clerks, who in old times were all clergymen, would not have so framed their writs as to oust the Spiritual Courts of jurisdiction. If the Court should grant the writ now applied for, they must do the same with respect to the writs *de telonio* and *ne injurie vexes*, of which they never take cognizance, unless authorised by writs out of *Chancery*. This is a prerogative writ: there is no distinction in principle between a *mandamus* and a prohibition, the one commands the party to do something, the other restrains him from doing something. Nay, there is a difference between the method

method of granting prohibition in the *King's Bench* and the *Common Pleas*: here a suggestion must be entered on record, for it is the suit of the party; there it is a commission prohibitory issuing at the suit of the King on a mere surmise. *Latch.* 114. The words of Lord Coke, when sitting in the *King's Bench*, "we will also for the King grant a prohibition," 2 *Bulst.* 279. and "it is the King's writ," 1 *Roll.* 335. can have no application to the Court of *Common Pleas*; for its being the King's writ is the very reason why it should not issue from this Court, which only holds pleas between party and party. But the Court of *King's Bench* has the power of issuing certain writs, such as *mandamus* and *quo warranto*, which are peculiar to that Court where the King himself is supposed to sit, and with which no other Courts, not even the Court of *Chancery*, can interfere. Besides there is less objection to this writ lying in the *King's Bench*, where the crown has its officer called the King's coroner, who acts as its attorney.

3dly, This is an application to the discretion of the Court. 1 *Ld. Raym.* 587. If the writ were demandable *ex debito justitiae*, the party need have done nothing more than file an affidavit of the truth of the suggestion; but here the Court has granted a rule to shew cause. It is to be observed, that in all the cases where prohibitions have been granted against churchmen, it has been at the suit of their patrons. From the record, *Liber Placitandi* 246. the application in the Lord of *Rutland's* case appears to have been made by the patron, though the reports do not state it so. In *Strachy v. Francis*, 2 *Atk.* 217. an injunction was granted against a rector on behalf of the patron, to stay waste in a church-yard; but there the Lord Chancellor, according to a manuscript (a) note and another report of the same case in *Barnadiston's Reports in Chanc.* 399., by the name of *Bradley v. Strachy*, doubted at first whether even a patron could have it, or whether it must not be obtained at the suit of

(a) This was a note in the margin of
1 *Eg. Ca. Abr.* 399. formerly belonging to
Mr. Brown of the Chancery bar, and was
as follows; "March 17th, 1740, at the
seal *Strachy v. _____*, Motion by Mr.
Attorney General for injunction by the
Plaintiff who was patron of the church,
(and Q. if ordinary was not co-plaintiff?)
to stay waste on lands bought out of the
money for the augmentation of poor
lives. Lord Hardwicke at first doubted
if such a bill was proper, unless in the

name of the Attorney General, imagin-
ing the patron was only a trustee for the
church, and interested only as to the
presentation, and denied the injunction,
but the next day he changed his opinion,
and granted it, saying it was a proper
bill, in imitation of the prohibition of
waste, which the patron might have at
common law; and he cited *Roll's Abr.*
tit. *Waste*, and *R. Lifford's* case, *Co.*
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the crown. So the injunction in *Knight v. Moseley, Amb. 176.* was allowed on a bill by the patron; and it was there said by the Lord Chancellor, "that an injunction has been granted against a bishop at the instance of the *Attorney General*," though indeed on a search in the Court of Chancery, no injunction to a bishop is to be found on its records. Here the application is on the part of an uninterested stranger; which if the Court were to allow, a writ might be obtained, to prevent that being done, which those who have the patronage might consider as tending to the melioration of the see, on the ground of its being waste within the strict terms of the common law. The only line for the Court to pursue, is to examine whether the act of the bishop has been for the benefit of the church or not. Now it appears by the affidavits on the part of the bishop, that in this very instance the most effectual means are taken by him for the improvement of the revenues of the see. If the trees belonging to the church could never be cut down, the consequence would be, that after a certain period they must decay, and the see would be rather impoverished than improved. That bishops may cut them, may be collected from the right which they formerly possessed of granting leases without impeachment of waste; which right was recognised in the Bishop of London *v. Web*, 1 P. Wms. 527. and the Bishop of Winchester's case, cited Freem. 55.: in the first of those cases an injunction was obtained against the tenant for carrying away the soil for bricks, and in the second for cutting down all the trees at the end of his term; but both at the desire of the bishops for an abuse of a privilege which their predecessors had a right to grant.

The Counsel in support of the rule. The questions of law are three: 1st, Whether in the case of a bishop felling and grubbing up the woods of his see, a prohibition will lie at all? 2dly, Whether it will lie in the Court of Common Pleas? 3dly, Whether it will lie in the Court of Common Pleas without plea depending? The stat. West. 2. c. 14. was only intended to correct an error which had obtained, that damages could not be recovered for waste done before prohibition issued, and for that purpose a writ of summons was given: but that it was not intended to take away the original writ of prohibition is clear from the preamble, and from Lord Coke's comment on the stat. Gloucester, 2 Inst. 299. where he says, "this remedy may be used at this day." It is also to be considered whether bishops and

and other ecclesiastical persons who hold estates for *life* do not come within the spirit of stat. *Marlebridge*, c. 23. and stat. *Glos.* c. 5.; for although bishops are held to be something more than mere tenants for life, yet that is only to enable them to sue, not to alienate their estates. Besides, they fall within two of the descriptions of persons who were liable at common law: the church lands being constantly denominated the dowry of the church, and church-men being assimilated to tenants in dower, and also being looked upon as the guardians of the church, which according to the maxim of the law is always *infra etatem*, they must be equally liable to a writ of prohibition with tenants in dower and guardians in chivalry. It has been contended that a bishop is so far seised in fee of his temporalities, that before the restraining statutes he had the complete disposal of them, except as to absolute alienation: and two cases were cited in support of this doctrine, 1 P. Wms. 557. and *Freem.* 55. but both those cases seem to refute the proposition, for in both of them the Court enjoined the lessees from doing what they certainly might have done under a lease from any other tenant in fee. The act of the Court in those cases can be supported on no other ground than this, that if the lessee, under colour of an authority from the bishop, was attempting the disinheritance of the successors of the fee, he was exceeding that power which the bishop was entitled to confer, and doing what the bishop himself could not have done.

It has been argued that the cases of prohibitions to stay waste committed by rectors in their church-yards, were grounded on the 35 Ed. 1. and that that statute was not in affirmance of the common law: but the church-yard is a part of the glebe, and the rector was as much restrained from committing waste there, as on any other part of the glebe: besides, Lord Coke expressly says, in *Liford's case*, that the treatise, intituled "Ne rectores profierant," &c. is in affirmance of the common law.

The application of the Bishop of Durham's case to this has been denied. It has been contended, that having received the assent of the three branches of the Legislature, it ought to be considered as a statute; but its never having been treated as such in the courts of law affords a sufficient answer to that observation. We must also recollect that the two Houses of Parliament at that time entertained a species of original (a) jurisdiction,

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(a) Vid. *Hale on Parliaments*, c. 27. by Hargrave.

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which has been many years disused. The Rolls of Parliament shew that the House of Commons, as the great inquest of the nation, not only presented offences, but preferred the complaints of individuals, which were decided upon by the Crown, assisted sometimes by the councils, and sometimes by the courts of law. Perhaps the Bishop of *Durham's* case was decided in the latter way. It seems to have been a presentment by the Commons to the Crown, and by the Crown referred to the Courts of law. The matter of complaint was cognizable by them: and the remedy pointed out and given, was a prohibition issuing somewhere, and applicable to the case of a bishop cutting down the timber on his diocese. Lord Coke's words in *Stockman v. Whither* do not contradict the Roll in Parliament. The parties were referred to the ordinary process of the Courts of *Westminster Hall*, and possibly, instead of applying to *Chancery*, they applied to the *King's Bench*, and so the prohibition went from thence: or the contradiction may be explained in the manner suggested by the counsel on the other side. Anciently all prohibitions may have originated in writs out of *Chancery*; and this is much confirmed by the forms of pleading at this day: for the declaration supposes such a writ to have issued, and charges the party with having disobeyed it, and he is proceeded against as if he had. It is well known, that in common cases in this Court, no original is sued out till the record is made up: in this manner the original writ in prohibition may have been entirely disused: but if the ancient practice had not been departed from so early as the 35 *Ed. I.* the writ would first have issued from *Chancery*, and the process upon that writ might have been made returnable in a court of common law, 38 *H. 6.* 14., and then, if that Court gave judgment upon appearance of the party, it would issue the ultimate process, which would be the effectual writ of prohibition. An attempt has been made to shew that the Bishop of *Durham* was not in possession of his temporalities at the time when the above case was decided; but that he was considered as a stranger trespassing on the lands of the Crown: this however could not be the case, for he appears to have been levying tallages at that very time on the bondsmen of the church.

But the power of the courts of common law to grant this writ does not rest on the Bishop of *Durham's* case alone. For in *Stockman v. Whither*, 1 *Roll. 86.* Lord Coke, after advertiring to

to that case, says, "and this seems to be good law;" and in 2 *Bulst.* 279. it is said, that the whole Court agreed with him. The same is again recognised in *Stampē v. Liford*, *Roll.* 100. and *Liford's* case, 11 *Co. 49.*, where it is called the ordinary remedy of the common law. That a prohibition may issue against a parson is clear from *Knowle v. Harvey*, 1 *Roll.* 335. 3 *Bulst.* 158. and though that case is open to the observation that there was a plea pending, yet it is expressly said to have been granted by the common law on suggestion. *Sacker's* case was not plea pending, for the suit was at an end, and Lord *Coke* there said, "you may have a prohibition, not only for the patron, but also for any; for the second incumbent: for this is the King's writ, and any one may have a prohibition for the King." Whether *Cof-tard's* case was under 35 *Ed. I. ne rector, &c.* or not, is immaterial, since that statute was in affirmation of the common law, and clearly a prohibition of waste was there granted against a vicar on motion in the *King's Bench*. These cases are almost all abridged in 2 *Roll. Abr.* 813. and to them is added *Acland v. Att-well*, to which no answer has been given. In the Lord of *Rutland's* case, 1 *Keb.* 557., which, according to the record in the *Liber Placitandi* 246. is the most accurate report, the Court said they would grant a prohibition against a parson for waste in cutting trees; and in *Liber Placitandi* 240. there is a record of a suggestion for such a prohibition in the *King's Bench*, which serves to shew that cutting down trees was then the subject of prohibition on suggestion in a court of common law. This doctrine therefore does not depend on the hasty *dicta* of Lord *Coke* in court, but was deliberately adopted by him in his closet, and introduced into his reports; nor does it rest on the authority of one Judge or one reporter, but is confirmed by the repeated determinations of the whole Court, reported in different books. It seems also to have been sanctioned by the subsequent opinions of Lord *Hardwicke*, 2 *Atk.* 217. *Barnardifl.* 399. and *Amb.* 176. who granted injunctions against churchmen to stay waste on analogy to the prohibition at common law.

2dly, A distinction has been attempted between prohibitions to restrain waste, and to restrain an excess of jurisdiction, but has been supported by no authorities; and reason operates against it. It has been urged, that unless this Court were to issue prohibitions to inferior Courts, its own jurisdiction would be infringed. But it may be answered, that such prohibitions

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issue on matters which could never come before the *Common Pleas* for judgment. Thus if an inferior Court construe an act of Parliament, in a subject peculiar to its jurisdiction, contrary to the rules of the common law; as in cases of prize, which are not cognizable by this Court. *Brymer and others v. Atkins*, 1 H. Bl. 164. But supposing it had anywhere been holden that this Court had not a concurrent authority with the *King's Bench* in prohibiting the inferior Courts, yet in cases of waste, which seem to be peculiar to this Court, it ought to have the power of prohibition. This is called a prerogative writ, but it is also a civil remedy; and indeed the prohibition to the inferior Courts is as much a prerogative writ as the present. So *quare impedit* is a prerogative writ; and yet that is so peculiar to this Court, that it is an instance of the King's power that he may sue it in any other Court. (a)

3dly, It stands settled as the unanimous opinion of all the Judges, that this Court may grant prohibitions in certain cases without plea pending. *Langdale's case*, 12 Co. 58. 4 Inst. 100. If therefore it is established that the circumstance of plea pending is not necessary to give jurisdiction to this Court, then all the cases which have been cited of prohibitions granted in the *King's Bench* plea pending, may be considered as authorities for the *Common Pleas* to grant them where plea is not pending. In this question the Court will not examine how far the timber ought, with a view to the benefit of the church, to be cut down, or whether the produce is to be employed for the reparation of the palaces or other tenements of the fee. The intention of destroying the woods of the diocese is avowed. But the law protects the thing as it is, and the Court will not allow him who is committing what must be deemed waste, to say, that such waste will be for the benefit of his successors.

EXRE Ch. J. One good effect which has arisen from the length of this discussion is, that the way has been much cleared for the consideration of the precise question before the Court; namely, Whether a writ of prohibition lies in the Court of *Common Pleas* to restrain a bishop from committing waste in the possessions of his fee?

The state of the common law with respect to waste has been so fully laid open by the bar, that I need do little more than allude to it. At common law, the proceeding in waste was by writ of

(d) *R. & T. 29, 30. F. N. B. 32.*

prohibition

prohibition from the *Court of Chancery*, which was considered as the foundation of a suit between the party suffering by the waste, and the party committing it. If that writ was obeyed, the ends of justice were answered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of *Chancery*, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shews the nature of it. It was the same original writ of attachment which was and is the foundation of all proceedings in prohibition, and of many other proceedings in this Court at this day. *Si (a) A. B. fecerit te securum, &c. tunc pone, &c. quod sit coram justiciariis nostris, &c. ostensura quare fecit wastam, &c. contru prohibitionem nostram, &c.* That writ being returnable in a court of common law, and most usually in the *Court of Common Pleas*, on the Defendant appearing the Plaintiff counted against him; he pleaded, the question was tried, and if the Defendant was found guilty, the Plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said, (and truly so I think, so far as can be collected from the text-writers,) that at the common law this proceeding lay only against tenant in dower, tenant by the courtesy and guardian in chivalry. It was extended by different statutes (*b*) to farmers, tenants for life, and tenants for years, and I believe to guardians in socage. That which these statutes gave by way of remedy, was not so properly the introduction of a new law, as the extension of an old one to a new description of persons; the course of proceeding remained the same as before these statutes were made. The first act which introduced any thing substantially new, was that (*c*) which gave a writ of waste or estrepelement pending the suit. It follows of course that this was a judicial writ, and was to issue out of the courts of common law: but except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text writers that any prohibition could issue from those Courts. By the stat. of *West. 2.* the writ of prohibition from the *Chancery* which existed at common law is taken away, and the writ of summons substituted in its place: and although it is said by Lord *Coke*, when treating of prohibition at the common law, that it "may be used at this day," those words, if true at all, can only apply to that very ineffectual writ directed to the

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(a) *Bracon*, lib. 4. Tr. 6. c. 18 & 19.
2 *Ist. 299. Reg. 35. & al.* (b) *Marlbridge*, c. 24. *Glosc. o. 5.*
(c) *Glosc. o. 13.*

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sheriff, empowering him to take the *posse comitatis* to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go, no such writ has issued even from *Chancery*, in the common cases of waste by tenants in dower, tenants by the curtesy, and guardians in chivalry, tenants for life, &c. &c. since it was taken away by the statute of *Westm.* 2. Thus the common law remedy stood with the alteration above-mentioned, and with the judicial writ of *etrepement* introduced *pendente lite*.

As far as can be collected from the text-writers of a very early period, and from the forms of proceeding contained in books of very high authority, such as the *Register* and *Fitzherbert's Natura Brevium*, it seems that there did not occur in practice, and that there was not in fact any remedy at common law against churchmen committing waste, sufficiently known for them to treat of. *Bracton* has two whole chapters in the fourth book, on the subject of waste. His observations are confined to persons liable to the action in the time of *Hen.* 3., and he (a) gives the writ of prohibition as the foundation of the suit. The *Register* and *Fitzherbert* take no notice of that writ, because they proceed upon the law as altered by the statute of *Westminster* 2., and accordingly consider the writ of summons as the foundation of the suit. But no one of them has a writ directed against a churchman. It is not merely that these books are silent on the subject, but the case which was alluded to, 2 *H.* 4. 3., proves to demonstration that such a course of proceeding at the common law against churchmen was not in use at that time. In that case *Thirning Ch. Just.* takes upon himself to pronounce, very authoritatively, that churchmen cannot be punished at common law if they cut down all the woods of their ecclesiastical possessions. I will not say that the law was so, but I may safely make this inference from his words, that such a proceeding was not usual or in practice at that time.

Our books are full of declarations that destruction and dilapidation are causes of deprivation in churchmen, and that affords some argument to prove that waste by them was not that of which it was supposed the common law could take notice, since it was referred to another jurisdiction. It is not very consonant with the simplicity of the old law to give two remedies for the same evil;

(a) *Bracton*, lib. 4. Tr. 6. c. 18. f. 2. 2 *Inst.* 299.

if a remedy was already provided at the common law, the ecclesiastical jurisdictions would not be allowed to interfere to the extent of deprivation. So if there was an effectual remedy by the ecclesiastical censures to that extent, it affords a strong ground to infer, that there was no proceeding at common law in the same case. I cannot find, from the earliest writers, down to the 12th of Jac. 1. that it was ever understood or treated of in the books of common law, that any proceeding in waste lay against a churchman. It was reserved for the learning and industry of that great man Sir *Edward Coke*, whose name ought never to be mentioned in a court of law without the highest respect, to bring to light the record of the Parliament Roll of 35 Ed. 1., which I need not now re-state, as it has been so often mentioned at the bar. After that record was brought to light and considered, Sir *Edward Coke* and the Judges of his time, thought themselves warranted in making several very important conclusions from it: First, they said that the King's answer had a reference to the course of the common law; they went further, and from thence inferred, that a writ of prohibition lay at common law against a churchman who committed waste; they proceeded further still, in concluding that such a prohibition lay in the Court of *King's Bench*, and going one step beyond that, they declared that such a writ of prohibition being the King's writ, and founded on his right of patronage, any man might have it. In this manner may be explained the strong language of Sir *Edward Coke* as reported in 1 *Roll. 86*. "If any man will move it, I will grant a prohibition." I do not perceive that it was observed at the time when this language was held, that such had been the known course of the common law previous to the discovery of that record. An expression which, according to the report of the same case in 2 *Bulst.*, fell from Sir *Edward Coke*, and which confirms me in the opinion that it had not been so understood by those Judges, is very remarkable. Sir *Edward Coke* there says, "We will *revive* this proceeding;" an expression which leads me to infer, that if such a remedy ever existed, it had been buried for three centuries in obscurity. Let me now suppose for a moment that Sir *Edward Coke* and the Judges of his time were right in their conclusions on that record; that there was a remedy at common law; that such remedy was the writ of prohibition; that the Court of *King's Bench* might issue it, and lastly, that any man who applied to that Court might have it; still we must recollect that we are fitting in the Court of *Common Pleas* and not in the Court of *King's Bench*. All these admissions

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admissions therefore do not prove that the Court of *Common Pleas* can issue such a writ; and before we do issue it that must be proved. I have watched the course of this argument to see whether there was any instance, I will not say usage, or even any adjudged case, but whether there was any instance to be found, where the Court of *Common Pleas* had thought itself authorized to issue such a writ. I find no such instance. There being no such instance, we might stop here; we might say that the Court of *Common Pleas* not being a court of original jurisdiction, but deriving its jurisdiction from the great seal, from the *Officina Brevia*, it must not take upon itself to issue writs of prohibition, because they are issued by the great seal, or because they may have been issued by the *King's Bench*, for reasons which have not been disclosed, or which do not apply to the Court of *Common Pleas*. But as the matter has been gone into so largely at the Bar, and is of importance, I will go a little farther into it here.

Notwithstanding the text-writers on the common law, and *Fitzherbert* in his *Natura Brevia*, and the Register, have no reference to any common law remedy against churchmen committing waste, yet there is much to be collected now which will give great support to the idea of Sir *Edward Coke*, that there was such a remedy at common law. The first thing on which I lay great stress is, the record to be found in 2 *Roll. Abr.* 813. (a), of a proceeding in the case of an abbot in the King's patronage, to whom a writ of prohibition is directed, and not only that, but there is a *scire facias* to bring him in to appear and answer in the Court of *King's Bench* for his defaults. So that there is a formal process in prohibition at the common law under the great seal with a *scire facias* directed to the sheriff immediately following the reference to the place where the writ is to be found. That is a record of an earlier date than 35 *Ed. 1.* being dated 3 *Ed. 1.*; and therefore does seem to lay a foundation for the conclusion of Sir *Edward Coke*, that the proceedings in 35 *Ed. 1.* had a reference to the course of the common law. The reasoning stated in

(a) Rex vicecomiti salutem: Cum ad nos providere pertineat ut Eleemosina que de Patronatu nostrorum Predecessorum & nostro fuit, in statu debito absque vasto venditione vel destructione inde facienda conservetur: tibi præcipimus quod non permittas quod Abbas de *G.* & c. sui vastum venditionem vel destructionem faciant de boscis dominibus hominibus pertinentibus ad Prioratum sive cellam de *L.* quod est de Patronatu nostro & taliter te habere in hac parte ne pro defectu tuo vel Ministrorum tuorum ad te nos graviter capere debeamus. Teste Rege 3 *E. 1.* Rot. Claustrarum memb. x. Et la spres un Brief direct. al Vicount quod Scire faciat Abbatii de *G.* & Priori cellarii suarum de *L.* quod sint coram nobis in octabis ut super defectibus, &c. respondeant.

the

the introductory part of the writ, on which it is founded, seems to contain fair common law grounds of argument. What is in the King's patronage ought to be preserved in its proper state without alienation or destruction: and this is perfectly consistent with the whole system of the common law, which, while it preserved the immunities of the church, was extremely attentive to the prerogatives of the Crown; whilst it secured the churchman in the fullest enjoyment of the possessions of the church, it looked up with anxious care to the preservation of the patronage of the King. When therefore I find a record of greater antiquity than the record in Parliament of the 35 Ed. 1. grounded on the principles of the common law, I cannot but think that it gives great support to the opinion of Sir *Edward Coke*: and though I am unable to explain how it should have happened that no mention is made by text-writers of such a course of proceeding, and though probably Sir *Edward Coke* never saw this record of a proceeding in 3 Ed. 1. yet I do not complain, or think that there was any thing of haste or passion in the inference which his sagacity drew from the single record of 35 Ed. 1. That record however only authorizes a writ from *Chancery*; Sir *Edward Coke* went further, and said that it might issue from the Court of *King's Bench*. When I look for the authority for that part of his proposition, I do not find it. It seems pretty evident that when he first mentioned that record in court, he did not perfectly understand it, and proceeded on a misapprehension of its contents. He says it was agreed in Parliament, that the Court of *King's Bench* should issue the writ, and that it was so ordered. He could not have supposed that the Court of *King's Bench* was ordered by Parliament to issue the writ, if the King's answer had been before him "*Inhibeatur per l'reve de Cancellarii*." He undertakes to say that it was actually moved for in the *King's Bench*, and issued by that Court; but not vouching his authority, one may conclude that it being so ancient a record he might have but confusedly remembered it, and was only following up his first mistake, and considering that as done, which, as he believed, was commanded to be done. When that part, therefore, of his proposition comes to be examined, it may be exceedingly doubtful, whether it be equally well founded with the other. It may be perfectly consonant to the principles of the common law, that a writ of prohibition to a churchman should issue from the *Officina Brevia*, from which all writs of prohibition issue, in all cases at common law. Lord Keeper *Coventry*, it appears in *Roll. Abr.* 813.

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did afterwards issue such a writ, which is a further confirmation of Sir *Edward Coke's* doctrine to that extent; yet it does not therefore follow that it may also issue from the *King's Bench*: but when he goes one step further, and says that it may be had by any body, his assertion seems totally unsupported. I do not mean to pronounce that the Court of *King's Bench* could not lawfully issue that writ, and that it could not issue it on the application of any man; but I do mean to say, that I do not perceive the reasons for its so doing. And not perceiving the reasons, it becomes a very difficult thing for us in this Court by any analogy to follow the Court of *King's Bench*. If the question should arise there, they will consider it, and inform us on what grounds they proceed; but where the grounds of this proceeding at present are involved in so much obscurity, so little known, so little understood, can the Court of *Common Pleas* take upon itself to do by analogy what has been done by the *King's Bench*?

My Brother *Adair* felt a difficulty as to the *King's Bench* having granted the writ of prohibition in 35 *Edw. 1.* arising from the words "*inhibeatur per breve de Cancellariā.*" He tried to explain it by a reference to a case in the Year Book, 38 *H.6. 14.* That case begins, "A prohibition was sued out of *Chancery*, directed to the Justices of the Common Bench to make attachment," &c. but the first line of that case, after all the pains we have taken, remains altogether unintelligible. He supposed the prohibition might be in some manner returnable in the *King's Bench*, and that when it was there, that Court would act upon it. But that proceeding must then have been in consequence of a writ from *Chancery* coming to the *King's Bench*. Taking that to be so, though I never saw such a writ, or heard of it, except in the Year Book I have alluded to, it will not serve the purpose of the present application, which is an original application for a prohibition in the first instance to this Court. Here there is no commencement of a suit, no writ to us from *Chancery* to give us jurisdiction in the matter. If therefore (though I have no idea that such a writ could issue) the difficulty could be reconciled in that way, it would not avail in this case.

It is said that there is such a cogent analogy between the proceedings of this Court and the Court of *King's Bench* in prohibition, that if they could lawfully issue such a writ, we ought to do so likewise. Granting that they did issue such a writ in the 12 & 13 *Jac. 1.* as it appears from 1 *Bulst.* and 1 *Rolle*, they did, and that they meant to act on the idea which has been stated, I

can only consider those cases as authorities so far as they go. But if the foundation on which they proceeded fails, those cases will fail also: and seeing how little has been done upon them in later times, they do not now furnish that great weight of authority which will justify us in acting upon them. I have mentioned that there was another case subsequent to this, in the reign of *Charles the First*, where Lord *Coventry* thought proper to issue a prohibition of waste to a churchman under the great seal, on the application of the patron. This I have said affords a further support to the principle of an original remedy at common law, which Sir *Edward Coke*, unassisted by, and indeed contrary to all practice, most sagaciously inferred from the 35 *Edw. I.*; but this does not aid the jurisdiction of the *King's Bench*. As to what the Court of *King's Bench* afterwards considered itself at liberty to do, in the Lord of *Rutland's* case, 1 *Keb. 557.* that went no further than a rule to shew cause, and therefore much stress cannot be laid upon it. The question is, Whether if the *King's Bench* has done right, the *Common Pleas* will also do right in following its example? I, who am not prepared to say that the *King's Bench* has done right, who ought not to say that it has done wrong, because the matter is not before me in a judicial way, cannot, on the ground of analogy, pronounce that the *Common Pleas* would be justified in doing what is now required of it. I must keep in mind what is said by *Bracton* of this Court, “*sine warranto jurisdictionem non habet*,” and that the exposition of *warranto*, &c. by Lord *Coke* (a) is, “that this Court cannot regularly hold any common plea in any action, real, personal, or mixt, but by writ out of the *Chancery*, returnable in this Court.” And though he afterwards says, by way of exception to the general rule, that this Court, without any writ, “may, upon suggestion, grant prohibition to keep as well temporal as ecclesiastical courts within their bounds and jurisdiction;” yet it should be remembered that the jurisdiction which we do exercise in those cases, is a jurisdiction which was established after a great deal of struggle and hesitation, even so late as the 7 *Jac. I.* on a reference by the Chancellor to the Judges of the *King's Bench* and *Exchequer*. It is true that their answer is reported in general terms; but it is equally true that Lord *Coke* introduces the subject when treating of the power of the *Common Pleas* to restrain ecclesiastical and inferior temporal courts, and therefore the answer must be understood to be confined to that

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particular species of prohibition. The circumstance which has been insisted upon, of this writ being for the King, rather militates against the power of this Court. The Crown has its peculiar courts for prerogative process: as the Courts of *King's Bench* and *Exchequer*, or the Court of *Chancery*. But the Court of *Common Pleas* is emphatically a court of pleas between party and party; and though the Crown may elect to proceed here for the maintenance of its civil rights, yet the Court of *Common Pleas* would be going out of its way, if, on the principle of this writ being "for the King," it should upon the ground of any analogy take upon itself to do what other Courts have done. In a case therefore where there is not practice to support us, where we have not strong lights to guide us, and analogies so complete and satisfactory as not to admit of being mistaken, I cannot but think it the safest course for us to decline doing now, what it does not appear that this Court has ever done before. The consequence is that I think the Court of *Common Pleas* ought not to issue this writ of prohibition. Admitting this to be the law, it is unnecessary for me to enter into the grounds contained in the affidavits. I need not say whether this application has been made on mere spleenetic, or on more worthy motives; nor whether the Lord Bishop of *Durham*, in this instance unintentionally doubtless, may not have done that which the law does not sanction, even though it should turn out clearly that the annual revenues of the see have been improved. Most certainly it is not to be concluded that, provided an increase of the annual revenues of the see is obtained, a permanent fund of real property in woods may be utterly destroyed. Few who know the Honorable and Right Reverend Prelate, who have been witnesses to the munificence which he has displayed in repairing and beautifying the fabrics of his church, of his castles, and his palaces, will suspect him of having intentionally wasted the possessions of the see of *Durham*. At the same time it is by no means impossible that he, as well as many other churchmen, may unwarily have slid into this heavy ecclesiastical offence, which all agree to be a cause of deprivation, and which may probably be found to be also an injury cognizable by some of the King's temporal courts. I do not at all regret the expence of time and trouble in this proceeding, since I cannot but think it may be productive of very good effects. It may awaken men's minds to the consideration of this sort of question, to which, at this time, it is of importance that they should be directed. We have already seen one cathedral church almost in ruins, and we have seen with what expence and exertion

exertion both of the clergy and laity that church was restored. Had it been in the minds of the clergy and laity for a course of years past, that the woods of bishops, and more especially of deans and chapters, including prebendaries, were a solid, permanent, and increasing fund of real property, devolved to them for the sustentation of the cathedrals, the palaces, and houses of the church, probably that venerable edifice might never have fallen into such ruin, or might have been restored with much less difficulty. I am afraid that the state of some other noble monuments of the finest Gothic architecture in this kingdom is not very令人满意的； that they are mouldering and crumbling into ruins. I have heard it observed with grave and serious regret, that no funds have been appropriated for the preservation of them: perhaps a time will come when that which I take to be an error will be corrected, and when it will be found that all the property of the church is a fund for the sustentation of those fabrics; but that the woods in particular are a specific fund so to be employed no man can doubt. I repeat my opinion that the consequences of this discussion may be highly beneficial to the public; and though I must now say that this rule must be discharged, perhaps hereafter the public will be disposed to acknowledge that the promoter of this application was a friend to the Church of *England*.

HEATH J. Though many points have been properly made in this cause, and have been elaborately argued at the bar, yet I shall confine myself merely to the discussion of those which principally affect the question in the view wherein I shall consider it. Previous to the inquiry whether the Bishop of *Durham* is liable to a prohibition for having felled the trees and grubbed up the woods in question, it must be decided whether such prohibition be grantable at the instance of *Jefferson*, a stranger, who is in nowise connected with this transaction in point of interest or otherwise. A prohibition for waste was certainly a common law remedy; it was therefore grantable at the instance of the party injured, and of no other person whatever. In ancient times it probably commenced in an original writ issuing out of *Chancery*; afterwards the Court itself granted it on a fiction that an original writ had issued. In the books there are some loose *dicta* that an act of parliament and the common law should respectively stand as originals according to the circumstances of the case; but this is not law, unless it be confined to prohibitions for excesses of jurisdiction, and to restrain waste. Recourse has been had to reasoning by analogy from the

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cases of rectors; but no case has been cited, no precedent has been produced of a prohibition against a parson to stay waste in felling trees that was not granted at the suit of the patron or churchwardens. The report of *Knowle v. Harvey* is very loose and inaccurate; it is not stated on whose suggestion the prohibition was granted; probably it was at the instance of a party interested. The same observation will apply to *Coflard's* case, 2 *Roll.* 111. In *Sacker's* case, 3 *Bulst.* the prohibition was granted *pendente lite*. There being therefore no instance of a prohibition granted in any analogous case, it remains to examine the case of the Bishop of *Durham*, 35 *Ed.* 1. I shall take my Lord *Coke's* own report of this proceeding, "by which it appears," says he, 11 *Co. 49. Lijford's* case, "that the Parliament referred him to the ordinary remedy of prohibition at common law." It does not appear even in this case who were the petitioners in Parliament. It might be at the instance of the bishop's own tenants who had common of leftovers in his woods. The commons made the application; for the commons were the great inquest of the nation. Cutting down the woods at that time was no small grievance, when the use of fofoile coals was not common. According to several books, it was said by Lord *Coke* that a prohibition was afterwards granted in the *King's Bench*; though it is not expressed whether, on the application of the King, the tenants of the bishop, or any other person injured by the spoil and waste. It is however observable that from the 35 *Ed.* 1. to the time of Lord *Coke* the precedent was never followed in a single instance. This appears by the avowal of the Chief Justice himself, for he is made to say, 2 *Bulst.* 279., "We will *revive* this again." In the Year Books 2 *H.* 4., cited at the bar by the counsel who shewed cause, it is said by *Thirning Ch. J.* that if a bishop or archdeacon shall cut down all his wood, he shall not be punished at common law: but this must be understood according to the subject-matter, that they shall not be subject to an action of waste.—*Thirning* says he shall not be punished by the patron, nor by any other way. It does not follow that a prohibition will not lie at the instance of a party injured, because a prohibition is not a procedure for punishment originally, though it might follow in the case of a contempt of the prohibition. The opinion of *Thirning* was extrajudicial; it may however serve to shew the current opinion of the day. It remains to be considered whether the circumstance of the King being interested will furnish a ground for the prohibition. This idea

idea is founded on a *dictum* of Lord Coke, reported to have been uttered on a different occasion, and principally referred to in *Roll. 335.* " Any person may have this writ against him, (meaning Sacker,) for it is the King's writ," and the prohibition was not to waste. By the King's writ he must be understood to mean a prerogative writ, for every writ is the King's writ. Does then this doctrine hold with respect to the other prerogative writs? It is not applicable to the writ of *mandamus* in the Court of King's Bench, or to the writ of *ne exeat regno* in a Court of Equity. Those writs are only grantable at the instance of some party interested. The writ of *habeas corpus* from necessity can only be applied for on behalf of the party interested. Admitting that a subject cannot sue an original writ in the King's name, the inference is, that he could not sue an original writ issuing out of the Court of Chancery; and if so, it goes a great way to prove that he is not entitled to a prohibition in this Court, which precludes a writ of prohibition issuing out of the Court of Chancery. Add to this, that this is a prohibition of a singular nature, inasmuch as it is founded on a suggestion, and applied for merely on affidavit. After all, what reliance can there be had on these *dicta* of Lord Coke under all the circumstances attending them? They were not the result of a calm dispassionate inquiry: that great lawyer was much heated in the controversy between the Courts at Westminster and the Ecclesiastical Courts. In every part of his conduct his passions influenced his judgment. *Vir acer & velenosus.* His law was continually warped by the different situations in which he found himself. There is the less reason for granting this prohibition, because it is not the only remedy: the Crown has its officers, whose duty it is to watch over its interests: the metropolitan may proceed against the bishop for dissipation: the officers of the Crown and the metropolitan may exercise their discretion, and are competent to decide whether this supposed melioration be really one or not. But we are bound by the strict rules of law, and cannot decide upon the propriety of the bishop's conduct, but only whether in strictness it amounts to waste. However, I do not find my opinion on the exercise of a discretionary power residing in the Court, but that neither on principle nor on precedent are we warranted in granting this prohibition at the instance of a stranger.

ROOKE J. I am of the same opinion. The question with respect to the power of the Court has been already so completely

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exhausted, that there is nothing for me to add. Something however has been said in the course of the argument, as to the right of bishops to destroy the woods which are the property of the church, on which I think it necessary to make some observation. I consider the bishop as having to certain purposes a fee-simple in his bishopric. But he is seised to a special intent, as a public officer for public trusts. If before the restraining statute he had alienated the property of the fee, he would have been guilty of a gross breach of trust, and I conceive there was a remedy at common law. As a general principle it is waste to destroy woods. But these great officers have duties annexed to their station; as the repairs of the palaces, bridges, and mansion-houses of the fee; and they would not exceed the limits of their duty if they applied the woods to the repair of their cathedrals. If through the forbearance of their predecessors, the woods belonging to the church are in such a state that it is advisable to cut them down, this may be done, very beneficially for the fee, by cutting only a part one year and a part another, and at the same time planting so as to create a renewal of this kind of property. But it may be doubted whether a bishop can *grub up* the woods at all without the licence of Parliament. At any rate, however, I am clear that this court has no jurisdiction in the present case.

Rule discharged.

Nov. 21st.2 *Baff's Rep.* 82.

334.

A defendant by perfecting bail above, waves all objections to the sufficiency of the affidavit on which he was held to bail.

CHAPMAN v. SNOW.

RUNNINGTON Serjt. on the 18th November obtained a rule to shew cause, why an *exoneretur* should not be entered on the bail-piece and a common appearance allowed; the affidavit of debt having omitted to negative a tender in bank notes according to the directions of 37 G. 3. c. 45. s. 9. (a)

(a) In *Stewart v. Smith*, a similar rule having been obtained, *Shepherd* Serjt. this day shewed cause, and stated that the affidavit was made in *Ireland* only two days after the passing of the act.

HEATH and *ROOKE* Js. (*absente. Eyre Ch. J.*) said, that though it was a hard case, they could do nothing, for the act was po-

sitive. Vid. *Nyfitt v. Pym*, 7 T.R. 376. note (e).

Shepherd then applied for leave to file a supplemental affidavit. *Sed per Curiam* — We have conferred with the Judges on the construction of this act, and think that a supplemental affidavit cannot be allowed.

Rule absolute.

The

The arrest took place on the 5th of *August*: the Defendant had put in and perfected bail above, and a plea had been demanded.

Le Blanc Serjt. shewed cause: and contended that the Defendant had waved any irregularity in the affidavit: 1st, By putting in bail above; 2d, By delaying to apply to the Court till the 18th *November*, twelve days after the commencement of the term, (a)

Runnington in support of the rule. It was impossible for the Defendant to make this application, till he was regularly in court, which he was not till he had put in and perfected bail.

HEATH and *Rooke* J^s. (absente *Eyre* Ch. J.) held that the Defendant had waved the irregularity, and

Discharged the rule. (b)

EYRE Ch. J. on the next day said, My Brothers have mentioned to me a rule for entering an *exoneretur* on the bail-piece, and allowing a common appearance, which was yesterday discharged, and I think properly discharged. The Defendant is not now in custody, he has put in bail, and is therefore too late to make this application. If he were to be allowed to move now, I do not see why he should not be at liberty to move after proceedings commenced against the bail. Perhaps the Plaintiff has proceeded against them, and is very near judgment; for any thing that I know, he may have got judgment. Where then is the Court to stop? Here the process is bad: the party does not come in the first instance, but does a voluntary act by perfecting special bail: the cause goes on with a total disregard to what has passed; the bail to the sheriff are discharged, and the whole of that proceeding is gone. Shall the Defendant now be allowed to apply to us to discharge the special bail, and introduce common bail in their place? I think that he should not be heard.

(a) *Vid. 7 T.R. 376. n. (a), Fenwick v. Heat,* where length of time was holden by the Court of *K.B.* to be no waiver of the objection. *Cont. Levy v. Dapont, ib. and Davenagh v. Copinger, 8 T.R. 77.*

(b) *Vid. Goodwin q.t.v. Parry, 4 T.R. 577. Hussey v. Wilson, 5 T.R. 254. Morgan v. Johnson, 1 H. Bl. 628. Norton v. Butler Danvers, 7 T.R. 375. King q.t.v. Horne, 4 T.R. 349.*

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14 East, 203.
11 V.C. Jun. 655.

If a Plaintiff become bankrupt after a nonsuit at nisi prius, and before the judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission.

WATTS v. HART.

SHEPHERD Serjt. obtained a rule to shew cause why the writ of *capias ad satisfaciendum* issued and executed on the judgment of nonsuit in this cause should not be set aside, and why the sum of 24*l.* 2*s.* 6*d.* levied thereon and paid into the hands of the sheriff of the county of *Middlesex*, should not be restored to the Plaintiff, he having obtained his certificate; and cited *Hurst v. Mead*, 5 T.R. 365.

The Plaintiff was nonsuited in an action against the Defendant at the Sittings after *Hilary Term* 1797; on the 26th of *April* following a commission of bankrupt issued against the Plaintiff, and on the 7th of *May*, being the 4th day of *Easter Term*, costs were taxed, and the judgment of nonsuit afterwards signed; on the 30th of *June* in the same year the Plaintiff obtained his certificate, and on the 5th of *August* following the Defendant sued out a *ca.su.* under which the sheriff levied the above mentioned 24*l.* 2*s.* 6*d.*

Adair Serjt. for the Defendant. It was uniformly helden till the case in 5 T.R. 365. that costs of this description not converted into a debt by judgment, or liquidated by taxation, could not be proved under the commission. In 3 Wilf. 272. the case of *Walter v. Sherlock*, Hil. 23 Geo. 2. is cited, where in an action of assault and battery before bankruptcy of the Defendant, and verdict for the Plaintiff with damages during his bankruptcy, but no judgment till after certificate, the Court held the debt not proveable under the commission, as not due at the time of the bankruptcy. So in *ex parte Sneeps*, Cooke's B. Laws, 192. where costs were taxed subsequent to the bankruptcy, but the order for the taxation was made before it, the Chancellor held that the taxation constituted the demand. The case of *Blandford v. Foote*, Coup. 138. though apparently against the Defendant, does in fact contain a strong implication in his favour; for though the bankrupt was there discharged, yet the reason given was that the original debt being clearly due before the bankruptcy, the interest and costs which had accrued since should stand on the same foundation. But in the present case there is no original debt to which a reference can be made: there is no damage and no demand, till the costs are taxed, and the judgment of nonsuit signed. The same observation applies

to the case of *Lewis v. Piercy*, 1 H. Bl. 29. as to that of *Blandford v. Foote*. So in *ex parte Todd*, cited in *Goddard and Vanderheyden*, 3 Wilf. 270. where the Defendant became bankrupt after a verdict in ejectment against him with nominal damages, and the Plaintiff signed judgment in the following term, and had costs *de incremento* taxed and allowed, Lord Chancellor *Henley* held that the costs did not become a debt till the judgment. This current of authorities is too strong to be shaken by the single authority of *Hurst v. Mead*, which appears to have been a hasty decision, as cause was shewn in the first instance.

Shepherd, in support of the rule, relied on the case of *Hurst v. Mead*, and said that *Buller J.* had there alluded to a similar case in the Court of *Common Pleas*, where the point was ruled the same way: but admitted, that he had not been able to find any other than that of *Lewis v. Piercy*.

EYRE Ch.J. The ground of the decision in *Lewis v. Piercy* must have been that there was an actual debt which existed before the bankruptcy, and though not converted into a judgment might have been proved under the commission independent of the action; and being so proveable, the subsequent proceedings might be considered as incident, and as nothing when separated from the subject to which they were incident. I would go as far as I could towards relieving the bankrupt, and if it could be made out that the substance of the debt were constituted by the nonsuit, and nothing more than the mere taxation were necessary to reduce it into a practical shape, in which it might be recovered, it might then be considered in the same manner as if the taxation were made on the very day (*a*) of the verdict given: but if a nonsuit at *nisi prius* be only a ground on which the Court is to pronounce judgment, then the judgment being that which constitutes the debt, and being after the bankruptcy, I do not know how to refer the debt to the time of the nonsuit. There seems to be only an inchoate interest arising on the nonsuit at *nisi prius*; you could not tax the costs till after the day in Court, and the *postea* returned: the nonsuit alone is nothing, absolutely nothing. When the record is returned into Court, the Court is to deal with it, and to pronounce the judgment of the law upon it; upon which the costs attach; but in order to make the judgment complete, the costs are first taxed. The costs are given with reference

(a) The day at *Nisi Prius* and the day in bank, the Plaintiff shall have execution against the hand which he had at the day of *Nisi Prius*. *Dier 149.* 1 Roll. Ab. 892.

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to the judgment of nonsuit, and not to the nonsuit at *nisi prius*, and therefore, as at present advised, I cannot agree to the case of *Hurst v. Mead*. The nonsuit at *nisi prius* was not that which gave any specific demand, proveable under the commission; for the debt was wholly unliquidated till the moment that the Court had pronounced judgment.

HEATH J. I do not see how any possible reference can be made to the time of the nonsuit at *nisi prius*: but after judgment had, the debt arising from the costs *transit in rem judicata* by virtue of the act of Parliament.

ROOKE J. This is one of many cases which bears hard upon the bankrupt. I should be glad to support the judgment in the *King's Bench*, and relieve the bankrupt, if it could be done consistently with the rules of law. But, as at present advised, I think the authorities the other way too strong.

The Court having desired the counsel to make inquiry into the circumstances of the case of *Hurst v. Mead*,

Shepherd on this day said, that by the rule and original affidavit in that case which he had obtained, it appeared to have been an application to discharge the bankrupt out of execution, on a *ca. sa.* for the costs of a judgment of nonsuit.

EYRE Ch. J. Thus much is certain that the nonsuit at *nisi prius* is that which necessarily produced the judgment of nonsuit. It will be difficult to distinguish this case from a case (a) where an action of slander was brought, and damages given by the jury, and before the day in bank, a commission of bankrupt issued against the Defendant, who on this ground was discharged out of execution. There was no original debt previous to the verdict in that case any more than before the nonsuit at *nisi prius*, in the case of *Hurst v. Mead*. I do not think either of the cases founded on principle. But the question is, Whether we ought not to adhere to a decided case rather than contradict it, where the demand is such as the Court cannot look upon with favour? On this ground we are of opinion that we must make

The rule absolute,

(a) *Longford v. Ellis*, cit. 1 H. Bl. 29. n.

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JOHN NORMAN Cross Demandant, WILLIAM GREY Nov. 22d.
Tenant, and ANNE PEAL and Another Vouchees.

2 Bef. & P. II.
456. 560.

The Court will
give leave to
amend a mistake
in the writ of
entry in a com-
mon recovery.

CLAYTON Serjt. on a former day moved to amend the writ of entry, *mittimus*, transcript, and recovery, in this case. The premises, as described in the deed to lead the uses, amounted, on being added together, to one hundred and sixty-eight acres two rods fifteen poles: in the recovery the parcels were described to be two messuages, thirty acres of land, thirty acres of meadow, and thirty acres of pasture, whereas the recovery was intended to be suffered of two messuages, fifty acres of land, fifty acres of meadow, and fifty acres of pasture: the mistake was supposed to have originated with the clerk in the country writing the figures 30 instead of 50; the parties were all alive.

It was urged that no inconvenience would arise from this amendment, provided that the increased fine for alienation were duly paid.

The Court directed the parties to apply, in the first instance, to the Alienation Office, and mention the matter again when that was done.

Accordingly it was afterwards brought on again by *Clayton*, who stated that an application had been made at the Alienation Office, where the practice was to rate a new fine for King's silver, on the whole number of acres, and then make allowance for the money received before, and that there was a precedent in the office of a manor having been added on a similar motion.

But the Chief Justice intimating his recollection of a resolution in the House of Lords, that no original writ could be amended, and wishing to consider to what length the practice of amendments had gone since that time, the case stood over till this day, when being again moved,

EYRE Ch. J. I hesitate about granting this motion, because I find a case in the House of Lords, where, on a reference to Lord *Holt* and the Judges, it was determined that a mistake in a writ of entry could not be amended either by common law or by statute. It is the case of Lord *Pembroke*, 1 *Salk.* 52. The practice I understand to be in favour of the amendment. My only difficulty arises from the case I have mentioned; but if my Brothers are satisfied I shall not oppose the amendment.

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HEATH J. By *Gage's case* (a), 5 Rep. 45. and several cases to be found at the end of *Piggott* (b), amendments of common recoveries are warranted; and during twenty-two years that I have sat here, it has been the constant practice to amend them by the deed to lead the uses.

ROOKE J. By the 8 H. 6. c. 12. original writs may be amended as to mistakes of the clerks. There is a case in *Blackstone* (c) also, where it was held that if a clerk mistake his instructions the *præcipe* shall be amended.

Leave was given to amend. (d)

(a) In 1 *Selk.* 53. and *Fortescue*, 188. *Gage's case* is said to be misreported, and not law.

(b) *Drake and another v. Biddulph*, p. 222. *Skinner and Others v. Land*, p. 228.

(c) *Vid. Watson v. Cox*, and *Henzel v. Lodge*, 2 Bl. 747. and 1065. also 3 *Wilf.* 154.

(d) *Vid. 2 Barnes*, 24. and 216. and *Jenkinson v. Staples, Cruise*, 2 vol. p. 183. where the *præcipe* and writ of entry in a common recovery were amended.—Also *Arthur Blackamore's case*, 8 Co. 156. 163. and *Wynne v. Wynne*, 7 Mod. 492. 506. 1 *Wilf.* 35. 42. *S. C. Pearson v. Pearson*, 1 H. Bl. 73. *Winb.* 99.

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2 *E&B's Rep.*

455.
Contra p. Ld.
*Ellenborough and
Heath J.*
pp. 142.

If a defendant be held to bail in this country on an instrument entered into in France, and by which instrument his property only and not his person, was according to the law of France made liable, the Court on motion will discharge him on his entering a common appearance.

VICTOIRE ADELAIDE FRANÇOISE MELAN v. The Duke de FITZJAMES.

A RULE had been obtained by Shepherd Serjt. calling on the Plaintiff to shew cause why the bail-bond given for the appearance of the Defendant in this cause should not be delivered up to be cancelled, on the Defendant entering a common appearance.

The affidavit of debt stated, "That the Defendant was justly and truly indebted to the deponent in the sum of 1000*l.* and upwards (a) on a certain deed, under the hand and seal of the Defendant, bearing date the 22d January 1789, made and executed in France, according to the laws there in force, to and in favour of the deponent."

By the instrument in question, the Defendant "creates, constitutes, promises, secures, and grants to the Plaintiff the sum of 30,000 livres, by way of yearly annuity, &c. which sum the Defendant promises and binds himself to pay to the Plaintiff, at his house, or to the bearer of this present deed, in four equal payments, at the four usual periods of the com-

(a) When this was first moved, the Court doubted whether the words "on a certain deed" were a sufficient description of the debt, to hold the Defendant to bail. But this objection was never mentioned again.

mon year, &c. authorizing the Plaintiff to take and levy the said annuity severally upon the property, goods, moveables and immoveables, at present or hereafter to be in possession of the Defendant; who for the better securing the payment of the said annuity, mortgages and renders responsible the whole of the said property, goods, &c. as above stated. This instrument to bear the interest of 10 per cent. according to law, &c. the Defendant promising and binding himself to fulfil the tenor of this deed, under penalty and mortgage of all his property, goods, moveables and immoveables, now or hereafter to be in his possession, and which he submits for that purpose to the restraint of jurisdiction of the Court of Chatelet at *Paris*, and fully renouncing every thing which may be contrary or injurious to these presents," &c.

An affidavit of a *M. D'Outrement* was also produced, stating, "That the deponent had been a counsellor of the Parliament of *Paris* during twenty-five years, and in that character was skilled in the laws of *France*: and that by the laws of *France*, and particularly by the 6th article of the 34th title of the Ordinance or Law of 1667, which was in full force when the said deed was made, not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort; and that the only case where a person could be arrested or imprisoned by the laws of *France* for debt, was upon a bill of exchange, or a commercial engagement; and that in every other case the property only was liable to be seized."

Adair Serjt. now shewed cause. This rule was granted in order to ascertain whether the security in question was that kind of security which imported a remedy against the person of the Defendant, or whether it was only in the nature of a mortgage on his estate. If this be a mere security, affecting the land and personal property only of the Defendant, and if it so appears on the face of it, the Court will attend to that circumstance. But if I can shew that it is a personal security affecting the person and following it every where, whatever may be the law of *France* as to the form of proceeding, yet when the party is found in this or any other country, he may be proceeded against according to the rules and practice of the country in which he is resident. The instrument was given for a subsisting debt, and may be called a bond. By it the Defendant binds first himself, and then his property.

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It is therefore in fact a double security. 1st, It is a personal security by which the person is charged. 2dly, It is a charge on the property real and personal of the Defendant. And yet it is contended, that though it has a double aspect it extends only to the property, and not to the person. Indeed the property, which is the subject of this mortgage, being in another country, and subject to the laws of that country only, the sole remedy which the Plaintiff now has is against the person of the Defendant.

Shepherd in support of the rule. The affidavit of *M. D'Outrement* is confirmed by the comment on the Ordinance of 1667, to be found in the posthumous works of *M. Pothier*, quarto edit. vol. 7. *Cinquieme Partie*, chap. 1. "De la Contrainte par Corps," from p. 278. to p. 285.; where it is laid down, that all constraint of the person, even after judgment, on all contracts, (except those which are there specified, and amongst which such a contract as the present is not included), was taken away by the law of 1667. This motion is not made on the ground of privilege; in that case the law of *England* would proceed according to its own rules. But if the contract was entered into with reference to the laws of *France*, it is the same thing as if those laws were expressly stated on the instrument. So if a bond is made in *France*, payable in *England*, being made with a view to the law of *England*, that law must prevail, *Robinson v. Bland, Burr.* 1077. In *Tallyrand v. Boulanger*, 3 *Vezey jun.* 447. the circumstances were much of the same nature as in the present case. It was stated in argument, that the Court of *Common Pleas* had discharged a Defendant on common bail, because his person would not have been liable by the law of *France* (a). And the Lord Chancellor said, "It would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place;" and added, "that he had no doubt that a court of law would upon such grounds discharge a Defendant, upon common bail."

EYRE Ch. J. In cases originating in this country, and wholly governed by the laws of this country, this Court rarely interferes in a summary manner to discharge a party on a common appearance, provided the affidavit of debt is conceived in positive terms; nor will the Court do it in any case unless it sees distinctly that an ill use has been made of the power of holding to bail. It has

(a) *Shepherd* admitted that he had not been able to find any account of such a case in this court.

been

been very often repeated, and I wish it were more clearly understood, that the Court does not mean to try the question between the parties on these preliminary motions. But it is a very different case when the ground of the debt is a transaction in a foreign country. It does not then originate in our law, but in the law of that country which creates the obligation. That law must be laid before us by evidence; since we do not take notice of it of course. When it is sworn that a party is indebted on a bond or a promissory note, we know what the nature of those instruments is, and the law concerning them; or if for goods sold and delivered, we know that goods sold and delivered may create such a debt. But if the plaintiff swear positively to a debt in this country, and refer to something which renders it ambiguous whether there be a debt or not, the party ought not to be held to bail. Suppose he were to refer to some contract which had the appearance of being equivalent to a bond, and the Defendant were to shew that it raised a demand for damages unliquidated; I think the Court would say, the Defendant may be held to bail upon a special order, but not by the mere force of the affidavit. Apply this reasoning to the case before us. The Defendant is held to bail on a contract made in *France*, the nature of which we must learn, not from the face of the instrument, but from evidence. There is no reference in it to the laws of this country. It must therefore be shewn what the laws of *France* are, and that they create an obligation which the laws of *England* will enforce. What would be a defence there, will be a defence here. The whole therefore turns on the laws of a foreign country. No general rule can be laid down; for whether there be a debt or not does not come within our knowledge, nor indeed that of the party himself, who may be mistaken with respect to the law. I do not know that we have ever done what is now desired of us before; but if it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of *France*, (on the principle of preventing arrests so vexatious as to be an abuse of the process of the Court) there seems to be fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit, in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed. If there could be none in *France*, in my opinion there can be none here. I cannot conceive that

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what is no personal obligation in the country in which it arises can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it.

HEATH J. I wish I could concur in opinion with my Lord; for I think this a very hard case. This affidavit swears as strictly as possible to a debt due on a written contract. It being a foreign contract the party has been called upon to produce it, and shew of what nature it is, before we allow the Defendant to be held to bail. Now this, on consideration, does seem to me to be a personal contract, and if it be so, I have not the least doubt that the Defendant should be held to bail. That being the case, we all agree, that in *construing contracts*, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws. But when we come to remedies it is another thing, they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements. If an *Irish* peer comes over to this country, he may be arrested on a contract entered into in *Ireland*, though his privilege would have protected him in that country. It would be hard if it were otherwise, since the advantage would not be mutual between the contracting parties. Suppose the Duke de *Fitzjames* might have been arrested by the law of *France*, and that he could not by our law, in that case he would have had the advantage; as it is, the Plaintiff has obtained an advantage, and ought not to be deprived of it. I shall be glad, however, if my Brother *Rooke* shall agree in opinion with my Lord, since it is a case which deserves compassion.

ROOKE J. I entirely agree with my Lord Chief Justice. Though the contract, on the face of it, may seem to bind the person of the Duke de *Fitzjames*, by the words, "binding himself," &c. yet being made abroad, we must consider how it would be understood in the country where it was made. According to the

the affidavit which has been produced on one side, and not contradicted by the other, this contract is considered in *France* as not affecting the person. Then what does it amount to? It is a contract that the Duke's estate shall be liable to answer the demand, but not his person. If the law of *France* has said that the person shall not be liable on such a contract, it is the same as if the law of *France* had been expressly inserted in the contract. If it had been specially agreed between the parties not to consider the Duke's person liable, and under those circumstances he had come over here, there would have been no difference between us; for if it were *agreed* there that the person should not be liable, it would not be liable here. Now as far as I can understand the contract, this is the true meaning of it. The defendant is not bound by the mere words of the contract, but has a right to explain by affidavit how it would be considered in *France*. With the explanation given I am satisfied, and being satisfied with it, I think the Defendant should be permitted to enter a common appearance.

Rule absolute.

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HUTCHINS v. HESKETH.

Nov. 23d.

THE Defendant, a prisoner in the *Fleet*, had formerly applied to the Court to be discharged under the Lords' act (*a*), and accordingly at that time delivered into Court a paper by way of schedule, stating that he was possessed of no property; on which he was remanded, the Plaintiff undertaking to pay him his groats. The Plaintiff having since discovered that the Defendant had some property at the period of his former application,

Clayton Serjt. moved the Court to have him brought up under *s. 16.* of the above act, in order that he might be compelled to assign over such property.

EYRE Ch. J. I am not prepared at present to direct the prisoner to be brought up and have a new oath tendered to him, by which, if he takes it, he must be convicted of perjury.

Rooke J. I think we cannot make this order.

Clayton, having been desired by the Court to look into this matter, this day mentioned, that he now had the consent of the pri-

If a prisoner brought up to be discharged under *s. 13.* of the Lords' act, deliver in a false schedule and is remanded, the Court will not at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule and assigning over that property which he had before concealed.

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somer to assign his effects by amending his schedule, and moved that he might be brought up for that purpose.

Sed per Eyre Ch. J. This motion is not made on any affidavit, stating any misapprehension on the part of the prisoner at the time of delivering in his schedule. What reason then is there for our doing what is desired of us? If a man in the situation of the Defendant had made a mistake, the Court would go as far as possible to assist him. But this is not that case. This is a detected man who has dared to give in a schedule as the schedule of a man without effects, when he really had effects. Here we are without apology for allowing him to amend his schedule. Should we assist him in his attempt to avoid those heavy penalties which are imposed by the act on persons who have conducted themselves in this way? He may possibly escape those penalties for aught I know, but it must not be by any act of this Court. Nor is it necessary for the sake of the creditor that we should interpose. If the Defendant really has such effects as the Plaintiff supposes, he may procure a title to them without coming to this Court. We shall not, after what has passed, order the prisoner to be brought up on this suggestion.

Clayton Serjt. took nothing by his motion.

No. 25th.
3 B&F. & Pult.
154.

A. being a banker in the country, discounts bills at four months for *B.* and takes the whole interest for the time they have to run; *B.* on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on *Leeds*, some at three, some at seven, and some at 30 days' sight; and held not to be an usurious transaction, so as to induce the Court to grant a new trial, since the surplus of interest taken by *A.* might be referable to the expences of remittance.

Sir B. HAMMET, Knt. and Others v. Sir W. YEA, Bart.

DEBT on bond for 25,200*l.*

Pleas.—1st, *Non est factum*; 2d, 3d, and 4th, Usury in the manner of discounting a promissory note for 1800*l.* dated the 13th of *August* 1795, and payable four months after date. 5th and 6th, Usury in the manner of discounting a promissory note for 3000*l.* dated the 25th *August* 1795, and payable four months after date. 7th and 8th, Usury in the manner of discounting a promissory note for 2300*l.* dated the 17th *Sept.* 1795, and payable four months after date: Each of the seven last pleas averring that the bond in question was given to secure to the plaintiff's (among other sums of money) the payment of the promissory note to which it related.

Replication. Issue joined on the first plea. To the seven last, “that it was not corruptly and against the statute, &c. agreed, be an usurious transaction, so as to induce the Court to grant a new trial, since the surplus of interest taken by *A.* might be referable to the expences of remittance.”

¶c. as the said defendant hath in that behalf alleged;" tendering issue. (a)

Rejoinder.

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Sir W. YEAH.

(a) The special pleas, which were drawn and settled with much consideration, were as follow :

1st. That after the 29th day of September A.D. 1714, and before the making of the said writing obligatory, to wit, on the 12th day of August, A.D. 1795, at, &c. the said J. H. was possessed of and interested in a certain note in writing, commonly called a promissory note, bearing date the 13th day of August in the said year of our Lord 1795, made and subscribed by the said J. H., whereby the said J. H. four months after date promised to pay to the said Sir William Yeah or order 1800*l.* value received. And the said Sir W. afterwards, to wit, on, &c. at, &c. indorsed the said promissory note; his own hand, being thereunto subscribed, and delivered the said promissory note so indorsed to the said J. H., and the said promissory note being so made and indorsed, and the said J. H. being so possessed thereof as aforesaid, after the 29th day of September A.D. 1714, and before the making of the said writing obligatory, to wit, on, &c. at, &c. it was corruptly and against the statute made in such case agreed between the said Plaintiffs, then and there being bankers and partners, and carrying on the business of bankers in partnership, and the said J. H. that the said Plaintiffs should lend to the said J. H. 1770*l.* in manner following; (that is to say,) that the said Plaintiffs, on the said 12th day of August in the said year of our Lord 1795, at Taunton in the county of Somerset, to wit, at London aforesaid, in the parish and ward aforesaid, should deliver to the said J. H. a certain bill of exchange in writing, drawn by them the said Plaintiffs on certain persons trading under the style and firm of Sir James Eslaire and Co. for 500*l.* payable three days after sight of that bill of exchange; and also a certain other bill of exchange in writing, drawn by them the said Plaintiffs upon the said persons trading under the style and firm of Sir James Eslaire and Co. for other 500*l.* payable seven days after sight of the said last mentioned bill of exchange; and that the Plaintiffs then and there, to wit, on, &c. at, &c. should lend and advance to the said J. H. other 470*l.* and should give credit to the said J. H. for other 500*l.* in account between them the said

Plaintiffs, as such bankers and partners as aforesaid and the said J. H.; and that they the said Plaintiffs then and there, to wit, on, &c. should forbear and give day of payment to the said J. H. of the said 1770*l.* so to be lent to the said J. H. in manner aforesaid, until the said 1800*l.* mentioned in the said promissory note should become due and payable according to the form and effect thereof; (that is to say,) until the 16th day of December in the said year of our Lord 1795, and that they the said Plaintiffs for such loan and forbearance of the said 1770*l.* so to be lent and forbore as aforesaid, should take 30*l.* when the said 1800*l.* mentioned in the said promissory note should become due and payable according to the form and effect thereof, to wit, on the 16th day of December in the said year of our Lord 1795, and that for securing the payment to the said Plaintiffs, as well of the said 1770*l.* as of the said 30*l.* the said J. H. should deliver to the said Plaintiffs the said promissory note so made and indorsed as aforesaid, to wit, at, &c. And the said Sir W. further saith, That in pursuance of the said agreement, the said Plaintiffs afterwards, to wit, on, &c. at, &c. did lend to the said J. H. the said 1770*l.* in the manner so agreed upon as aforesaid, and did forbear and give day of payment of the said 1770*l.* until the said 1800*l.* mentioned in the said promissory note should become due and payable according to the form and effect thereof, to wit, until the 16th day of December in the said year of our Lord 1795. And the said Sir W. further saith, That in further pursuance of the said agreement, and for securing the payment to the said Plaintiffs, as well of the said 1770*l.* as of the said 30*l.* the said J. H. afterwards, to wit, on, &c. at, &c. did deliver to the said Plaintiffs, and the said Plaintiffs did take and receive from the said J. H. the said promissory note so made and indorsed as aforesaid; And the said Sir W. further saith, That the said 30*l.* so agreed to be taken as last aforesaid by the said Plaintiffs for the said loan and forbearance of the said 1770*l.* in the manner so agreed upon as aforesaid, is above the rate of 5*l.* for the forbearance of 100*l.* for a year, to wit, at, &c. And the said Sir W. further saith, That he the said Sir W. afterwards, and after the said 29th day of Sept.

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Rejoinder. Issue joined.

The bond in question was given to secure the payment of six promissory notes at four months, drawn by one *James Haviland*, to the order of the Defendant, and by him indorsed to the Plaintiffs, who were bankers at *Taunton*, (*viz.* one dated the 1st of *July* for 1500*l.*; one dated the 13th of *August* for 1800*l.*; one dated the 25th of *August* for 3000*l.*; one dated the 17th *Sept.* for 2300*l.*; one dated the 17th of *October* for 2000*l.*; and one dated the 26th of *October* for 2000*l.*; amounting in all to 12,600*l.*), and all of which had been discounted by them. The

Sept. A.D. 1714,, to wit, on, *Ec. et. Ec.*, sealed, and as his act and deed delivered to the said Plaintiff the said writing obligatory with the said condition thereunder subscribed, for securing to the said Plaintiffs the payment of the said 1800*l.* mentioned in the said promissory note among other sums of money; and the said Plaintiffs then and there, to wit, on, *Ec. et. Ec.* accepted and took the said writing obligatory from the said Sir *W.* for the cause and purpose last aforesaid. By means whereof, and by force of the statute made in that case, the said writing obligatory is wholly void in law; and this, *Ec.* wherefore, *Ec.*

The 2d plea stated a corrupt agreement to discount the same note thus: That the Plaintiffs should lend *J. H.* 1770*l.* in manner and at the time following, *viz.* 770*l.* on the 4th *Aug.* 500*l.* on the 22d *Aug.* and 500*l.* on the 27th *Aug.* and should forbear and give day of payment of the 1770*l.* until the promissory note should become due; and that for the loan and forbearance of the said 1770*l.* the Plaintiffs should take 30*d.* when the promissory note should become due.

The 3d plea; That the Plaintiffs should give credit to *J. H.* for 300*l.* on the 14th *Aug.* and should forbear and give day of payment of that sum till the promissory note should become due; and should lend to *J. H.* 1470*l.* thus, *viz.* 470*l.* on the 14th *Aug.* 500*l.* on the 22d *Aug.* and 500*l.* on the 27th *Aug.*

The 4th plea, (which was on the note for 3000*l.*) after averring that *J. H.* was indebted to the Plaintiffs in 2500*l.* stated the corrupt agreement to discount thus; That the Plaintiffs should forbear and give day of payment of the 2500*l.* till the promissory note should become due; and should lend to *J. H.* 450*l.* in this manner, *viz.* 200*l.* on the 26th *Aug.* and 250*l.*

on the 28th *Sept.* and should forbear and give day of payment of the 450*l.* till the promissory note should become due; and that for forbearing and giving day of payment of the 250*l.* and for the loan and forbearance of the 450*l.* the Plaintiffs should take 50*d.* when the promissory note should become due.

The 5th plea stated an agreement that the Plaintiffs should lend to *J. H.* 2950*l.* in this manner, *viz.* 2700*l.* on the 26th *Aug.* and 250*l.* on the 28th *Sept.* and should forbear and give day of payment of the 2950*l.* *Ec.*

The 6th plea, (which was on the note for 2300*l.*) after averring that *J. H.* was indebted to the Plaintiffs in 1000*l.* stated that it was corruptly agreed between *J. H.* and the Plaintiffs, that the Plaintiffs should lend to *J. H.* 2261*l. 13s. 4d.* thus: That they should forbear and give day of payment of the 1000*l.* till the promissory note should become due, and should deliver to *J. H.* a bill of exchange on Sir *James Estdale* and Co. for 500*l.* at thirty days sight, and another for 300*l.* at the same number of days; and that the Plaintiffs should give credit to *J. H.* for 461*l. 13s. 4d.* and should forbear and give day of payment of the 2261*l. 13s. 4d.* till the note should become due, and for such loan and forbearance should take 38*s. 6s. 8d.* when the promissory note should become due.

The 7th plea, after averring that *J. H.* was indebted to the Plaintiffs in 1000*l.* stated a corrupt agreement to discount thus: That the Plaintiffs should forbear and give day of payment of the 1000*l.* till the promissory note should become due, and should lend to *J. H.* 1261*l. 13s. 4d.* in this manner, *viz.* 461*l. 13s. 4d.* on the 24th *Sept.* 500*l.* on the 27th *Oct.* and 300*l.* on the same day; and should forbear and give day of payment of the 2261*l. 13s. 4d.* *Ec.*

Defendant

Defendant however in his pleas made no mention of the note for 1500*l.* or either of those for 2000*l.* but only relied on the manner in which the three bills for 1800*l.* 3000*l.* and 2300*l.* had been discounted, as usurious; which was as follows:

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The note for 1800*l.* was discounted on the 14th of *August*, thus:

By a draft on Sir James Esdaile and Co. payable to <i>Haviland</i> or order, three days after sight, for	- - - - -	£ 500 0 0
By ditto, at seven days sight, for	- - - - -	500 0 0
By cash carried to the credit of <i>Haviland's</i> running account	- - - - -	300 0 0
By twenty-three cash notes of the Plaintiffs, payable on demand at their bank at <i>Taunton</i> or in <i>London</i> for 20 <i>l.</i> each	- - - - -	460 0 0
By one ditto for 10 <i>l.</i>	- - - - -	10 0 0
		£ 1770 0 0

The remaining 30*l.* was taken as interest on the note for the four months it had to run from the day on which it was discounted.

The note for 3000*l.* was discounted on the 24th (*a*) of *August*, thus:

By a draft on Sir James Esdaile and Co. payable to <i>Haviland</i> or order, thirty days after date, for	- - - - -	£ 250 0 0
By cash in discharge of a returned note of <i>Haviland's</i> , dated the 18th of <i>April</i> 1795, and indorsed by the Defendant, for	- - - - -	1500 0 0
By cash carried to the credit of <i>Haviland's</i> running account	- - - - -	1200 0 0
		£ 2950 0 0

The remaining 50*l.* was taken as interest on the note for the four months it had to run from the day on which it was discounted.

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The note for 2300 <i>l.</i> was discounted on the 24th Sept. (a) thus:	
By cash in discharge of a returned note of <i>Haviland's</i> , dated the 15th of May 1795, indorsed by the Defendant, for - - - - -	£ 1000 0 0
By a draft on Sir James <i>Esdale</i> and Co. payable to <i>Haviland</i> or order, at thirty days after date, for - - - - -	300 0 0
By ditto, at thirty days after date, for - - - - -	500 0 0
By twenty cash notes of the Plaintiffs for 10 <i>l.</i> each - - - - -	200 0 0
By cash carried to the credit of <i>Haviland's</i> running account - - - - -	261 13 4
	£ 2261 13 4

The remaining 38*l.* 6*s.* 8*d.* was taken as interest on the note for four months.

When the above notes were brought to the Plaintiffs to be discounted, the manner in which the money was to be advanced, and the respective dates of the drafts on the house of Sir James *Esdale* and Co. were directed by the persons who brought them, and who (as it appeared from the evidence of the managing clerk in the Plaintiff's house) might, had they wished it, have had either cash or bills payable on demand. Nothing was charged by the Plaintiffs for commission, postage, stamps, &c.

This cause was tried before *Eyre Ch.J.* at the *Guildhall* Sittings after *Trinity term* 1797, when his Lordship directed the special jury, that the charge of usury rested wholly on the Plaintiff's having made no rebate of interest on the bills which had a long time to run; that they appeared to be in the nature of a remittance of the borrowers money to *London*, and that if the Plaintiffs had not taken more than a reasonable compensation for their trouble, unless indeed the mode of payment had been made a term on which alone the bills would be discounted, it was not usury; that as to the bills of a short date there appeared to him to be little doubt; that if the bills had borne a very long date, it would have been strong evidence of a device to elude the statute; but that the bills at thirty days seemed to be of a middle kind; and it was for them to draw the line. The jury without hesitation found a verdict for the Plaintiffs. But on its being suggested that Lord *Kenyon* in

(a) This note having been dated the 17th, and not discounted till the 24th of not to have been taken; but being admitted to be a mistake, that was not in the same month, the whole discount ought fifted upon.

Matthews qui tam v. Griffiths, Peake's N. P.ri. 200. had delivered an opinion decidedly contrary to the verdict then given, *Eyre Ch. J.* made an order for the Plaintiffs to enter up their judgment as of **Trinity* term, according to an undertaking of the Defendant, but that execution should be stayed, in order to give the Defendant an opportunity of applying to the Court for a new trial.

Accordingly a rule having been obtained to shew cause why the judgment should not be set aside and a new trial be had between the parties,

Adair and Le Blanc Serjts. were this day called upon to begin in support of the rule (*a*). Wherever more than five *per cent.* *per annum* is taken for the loan or forbearance of money, with the knowledge and by the agreement of the parties, it is usury, whatever the nature of the transaction may be. On the principle of the laws against usury no consent or request of the person borrowing can make any alteration in the case, since those laws were made to protect indigent men against themselves. Indeed the form of pleading on the statute of usury shews that the consent of the borrower can never vary the case; since it is always stated that it was "corruptly agreed," which necessarily implies consent. Wherever country Bankers have been allowed to receive more than five *per cent.* they have received it as a compensation for the risk, trouble, and expence of remittance. Here the idea of referring the excess of interest to those circumstances can only be an after-thought (*b*), as it formed no part of the original transaction, which was a mere transaction of loan and discount, and not of remittance. If indeed it could be divided into two parts, and the Court could understand that after the money had been paid down to the borrower upon the bills, a second application had been made to the banker to remit part of that money to *London*, a question might then arise if the sum taken under the term of remittance was such as any custom authorized. Whether such a charge of remittance were a device to evade the statute or not, would be a point

(*a*) The following preliminary objection to the argument was taken by *Shepherd* Serjt. That a writ of error had been brought on the first day of this term, the motion for a new trial made on the second, and bill in error since justified; that the Defendant therefore had no right to have a motion for a new trial discussed, having expressed his intention of withdrawing the subject from the consideration of the Court; that he recollects a similar case in *K. B.* where the Court were of that opinion. *Sed per Eyre Ch. J.* Perhaps the writ of error was

brought under an apprehension of execution being sued out on the first day of term. Where a point of importance is depending and the effect of such an objection as the present would be to shut out that point in the court of error, we shall not allow the objection to prevail.

(*b*) In *Maddock, g. t. v. Sir B. Hammets and others*, 7 T. R. 185. Lord Kenyon said: "It shall not be permitted to a party who has knowingly received any thing as interest, to apply it afterwards to another account as he finds it convenient."

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to be determined by the jury. But there is an essential difference between the cases where a charge is professedly made for commiffion, and where no such charge is professed to be made, but more than five *per cent.* is actually taken. Nothing can take the latter case out of the statute; but in the former it will at once appear to the Court and jury, whether the sum taken is a fair charge for what it purports to be. If this had been a transaction of remittance, the banker would have had some certain rule to go by in his charge, as in the *Sudbury* case (*a*), where 5*s. per cent.* were taken; but here one bill for 500*l.* is drawn at seven days, and another for the same sum at thirty days. Though the party remitting has a right to stipulate for a compensation for the trouble and expence of remittance, yet he is not allowed to charge it in the shape of interest. This was the decided opinion of Lord Kenyon in the case of *Matthews qui tam v. Griffiths* and others, *Peake's N. Pri.* 200. (*b*)

Shepherd and *Runnington Serjts. contra.* It is admitted that more than 5*l. per cent.* may be taken, if taken for commiffion *eo nomine*. But the name cannot make the transaction more or less usurious, for if it be substantially usurious no device will protect the party; and, whether the money be received under one name or another, the reasonableness of the charge must be decided by a jury. The objects of the statute were two: 1st, To make void all bonds, contracts, and assurances for payment of money lent upon usury. 2dly, To punish the party who takes such usurious interest. Before the first of these provisions therefore can attach, there must be a contract, 4 *Bl. Com.* 158. *Loyd v. Williams*, 3 *Wils.* 261. *Murray v. Hardinge*, 2 *Bl.* 865. *per Gould J.* The terms of that contract are matter of fact. If it appears not to have been in the contemplation of the parties to take usurious interest, it will not avoid the bargain. *Abrahams qui tam v. Bunn*, 4 *Burr.* 2253. The question to be tried on this record was the existence of a corrupt contract, which has been negatived by the jury. They have determined that the money received was fairly referable to the expence of remittance as much as if it had been specifically stipulated for on that account. The contract for discount was complete when the borrower said, I want bills discounted, and the lender answered, I will discount them. The remittance was as distinct a transaction as if it had taken place on

(*a*) *Winch q. t. v. Fenn.* Sittings after H.T. 1786. *B.R.* before Buller J. cit. in *T.R.* 5*s.*

(*b*) The decision of that case was fully recognised by His Lordship in *Maddock q. s. v. Sir B. Hammett and others*, 7 *T.R.* 185. another

another day. If therefore no part of the original contract was usurious, nothing subsequent to that will vitiate the bond. *4 Burr. 2253.* So in *Floyer v. Edwards, Cwp. 115.* Lord Mansfield says, "Usury is an agreement originally to pay the principal, with interest above the rate of 5 per cent." and cites *Hawk. P.C. c. 82. s. 19.* That a party is entitled in some cases to take, not only 5 per cent. for legal interest, but also a reasonable sum for remitting, and other necessary incidental expences, is clearly settled. *Ariol v. Thomas, 2 T.R. 52.* *Bodily v. Bellamy, 2 Burr. 1096.* The true distinction is, whether the conditions of the contract are imposed on the borrower or not; in the present transaction they were not. So where there is nothing to which the money taken can be applied, but interest, it is usury. But here the excess of interest was fairly applicable to the expences of remittance. As to the case of *Matthews qui tam v. Griffiths*, it may be distinguished from the present, for Lord Kenyon himself observed that a second discount had there actually been paid on the notes in question.

EYRE Ch. J. I will begin with stating my assent to the proposition, that where a party on a contract for a loan intentionally takes more than 5*l. per cent. per ann.* for forbearance of that loan, he is guilty of usury. But I add to it this further proposition, that whether more than 5*l. per cent.* is intentionally taken upon any contract for such forbearance, is a mere question of fact for the consideration of the jury, and must always be collected from the whole of the transaction as it passes between the parties. And I am of opinion that it never can be determined that any particular fact constitutes or amounts to usury, till all the circumstances with which it was attended, have been taken into consideration. As on the one hand I am to carry into effect a law which the policy of all times has deemed useful, and which expressly provides against any subtle devices or evasions by which its penalties may be eluded (and had it not been so provided, I should have thought it my duty to use all the influence of my situation to prevent such devices and evasions from having any effect); so on the other hand common justice requires that the whole of the transaction should be before the jury, and should be taken fairly, with a just application of all the circumstances to every conclusion of fact which the evidence will warrant. Being of that opinion I cannot agree to the doctrine laid down at the Bar, that this transaction was necessarily to be taken to be a mere transaction of loan, and not of remittance; I think there was room to consider it as a mixed case

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of loan and remittance, and that we should do great injustice to the party, if we were to confine it to one and exclude the other. What is this case in matter of fact? *Haviland* applies to have his bills discounted; to which the banker agrees, and calculates the interest upon the time the bills have to run, as is usual. He asks how *Haviland* would have the money? *Haviland* desires to have a part in cash, part in account, and part in bills on *London* of different times to run. Had the banker told down the money, or tendered bank notes, and had *Haviland* put them into his pocket, or swept them into his hat, and then said, "But I want to send money to *London*; will you take part of my money back and give me bills?" and the banker had accordingly done so and given these bills, I cannot see that there would have been any colour for calling it an usurious transaction. Are we then to administer justice on such frivolous distinctions as the difference between the case I have put, and the case which actually happened? Can the usury depend on the circumstance of the money being told down or not? It was proved by the witness that the banker asked, "How will you have the money?" Which short question includes whether he would have it in cash or in cash notes, or in account, or whether he had any desire to have part of it remitted for him to *London*? The answer completes the transaction. Few words are necessary among men of business. Bills on *London* are given to a certain amount, and the rest is taken in cash, or that which is equivalent to cash. When we are construing any particular circumstances given in evidence in order to found a conclusion of fact in any case, and especially in a case of usury arising upon a transaction between men of business, we ought to deal with those circumstances according to the common sense of mankind. Surely there is a great difference between transactions with bankers, and the ordinary transactions between man and man. What passed between the parties, one of them being a banker, was equivalent to an agreement by the banker to discount *Haviland's* bills in cash; and equivalent to the actual discount of them; and also equivalent to an agreement to remit a part of that cash to *London* for *Haviland*; for which last purpose bills on *London* were given. Is there any thing unreasonable in the nature of this transaction? It has now become the course for bankers in the country to have credit on some house in *London* which is maintained at no small expence, and by means of which remittances are made with great facility. But let us simplify this idea. *A.* says

says to *B.* take my specie, you can find better means of conveying it to *London* than I can, and pay it to the person in *London* whom I shall appoint. In such a case, *A.* could not have sent his specie by the post, but must have hired a waggon for that purpose. Now if *B.* has established a mode of conveyance which renders the remittance more easy to him, what is that to *A.* whose money is remitted? Is not the banker entitled to a recompence for the accommodation he affords to his customer; and if in such cases the remittance is usually made by bills of thirty days, is not that a fair measure of a recompence, supposing there is no device in the transaction, and that the remittance is not intended to be used as a colour for putting more money into the bankers pockets for the mere forbearance of a loan than is allowed by law? I stated to the jury that if the banker had imposed this remittance on the borrower as a term of the discount, it would have been usury. I might have added, that if all consideration of loan were out of the case, a banker may lawfully take as much money as he can get for his bills without the least regard to the time they have to run. The authority of a case said to have been determined at *Nisi Prius* has been very properly pressed upon us in the argument. Certainly the opinions of the Judge who is said to have decided that case are at all times entitled to the highest respect from me, and from every Judge in *Westminster-hall*, and I never will hastily decide against the advised opinion of that great lawyer. But in my apprehension we are here debating no question of law; we are examining the evidence of a mere matter of fact, on an inquiry into a transaction between a banker and his customer. According to the letter of that case, as it has been reported to us, it was said, that unless the payment is made in ready money (a), the transaction is usurious; this would at once put an end to the banker's business. Neither in this nor in any other case of the same kind, does it necessarily happen that a single farthing in ready money passes between the parties. Here part of the money was carried to *Haviland's* account, the whole might

(a) According to a manuscript note of *Matthews v. Griffiths*, mentioned by the council in support of the rule, Lord *Kenyon* in the course of his opinion used the following expressions: "Where a party takes 5 per cent. discount as for ready money, and yet does not pay ready money, but bills payable at a future day, though both parties consent to this transaction, and

though it may be for the convenience of both, I am clear that it is usury: " And, " This is an offence against the Statute of Usury, for taking 5 per cent. for that which was not money at the time, and which was incapable of being converted into money's worth up to the extent for which the discount was taken."

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have been, and *non constat* when it would be actually advanced in cash by the banker. The counsel for the Defendant supposed a case where part of the money was not to be paid till a month after the transaction. I agree that would be taking interest for money not in any sense advanced, and would amount to usury. But if part of the money were carried to the account of the borrower, though he did not mean to draw for it for some time, and did not actually draw for it till the whole time on the discounted bill was expired, no man would doubt of the fairness or lawfulness of the transaction; and yet an interest is gained for the whole of that time, upon money not actually advanced. Suppose on discounting a bill a banker gives his cheque made payable on demand; every one considers it as cash, because it may be converted into cash directly: yet it may happen that the money may not be demanded for any given length of time. I am inclined to think that the jury considered these thirty days bills as cash; and there is a great deal to be said for it. It is true that they may be discounted by a holder, and so the taker of them may be charged with double interest, but they may also circulate through the country up to the moment of their falling due as cash, and may pass to all effective purposes as such, and though I do not think it fit for me to say that such bills are always to be considered as cash, because an ill use might be made of it, yet I cannot say that the verdict in this view of it was improper in this case. My opinion being, that the real transaction was just the same as if the whole sum had been told down, and then a part had been returned for bills drawn to suit the borrower's convenience, for the purpose of remitting the money to *London*; I repeat, that I cannot agree that in usury, more than in any other case, the whole transaction is not to be taken together: that it is not to be analyzed and reduced to all the parts of which it is composed, and to all the conclusions of fact, which fairly result from the whole of the evidence; and that the law does not arise from a fact so considered. Whether more than *5 per cent.* be intentionally taken for the loan and forbearance of money, is the question of fact to be decided by the jury. If it be proved that a bill is discounted, partly in cash, and partly in bills upon *London*, payable of course at a future day; this is but evidence to prove the fact in question, and may or may not prove that fact according to the explanations which may be given. If more than *5 per cent.* was gained by the transaction, the excess according to circumstances might be usurious,

rious, or might arise from a part of the transaction collateral to the mere loan; lawful in its nature, and extremely convenient to the other party; neither unjust nor oppressive; contrary neither to the letter nor to the spirit of the statute. Nor do I think there is any danger in this doctrine. The transaction is always before a jury. It is for them to say whether it is a device, or a fair agreement on good consideration; whether if there be any overplus, after the 5 per cent. taken for discount, it is properly referable to some lawful collateral consideration, or not; if it be so referable, we should do the grossest injustice, if instead of distributing the transaction into the parts of which it is composed, we were by a strict literal construction upon evidence to pronounce the contract to be what in substance it is not, a contract for mere loan and forbearance. On the whole of the case, I see no sufficient ground to say that the verdict is wrong. I thought the transaction so far doubtful at the trial, that I wished the jury to consider whether the giving these bills on London was not a mere cover for an usurious contract. I said that if the bills were drawn at a longer date than is usual in the course of business, it ought to be construed as a device. They were the best judges, and they thought there was no device: had they determined the other way, I should not have quarrelled with their verdict; but I think there is no sufficient reason for granting a new trial.

HEATH J. I am of the same opinion with my Lord, and cannot therefore think this a case in which we should grant a new trial. This was a transaction which commenced in discount and loan, and terminated in remittance. The question then is, Whether these two things must be consolidated, or whether they may not be divided? Now I think upon the evidence reported, that that question cannot be again raised here, if it has once been properly submitted to the jury; since they have decided it. The subsequent transaction of remittance was no part of the antecedent contract; the bargain for the discount was complete, and then the banker asked the person who brought the bill, how he would have the money. The true question is, whether the terms of the remittance formed the consideration of the loan; for if they did, the transaction was usurious. I agree to the general proposition of law as laid down by the Defendant's counsel, but think it a question for the decision of a jury. As to the case put at the Bar, of an agreement to leave a certain sum in the banker's hands for a month, that would be a clear device to elude the

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the statute, and no jury could doubt of the intention. Those who advance money may impose their own terms on those who are in want of it; but those who come with money to purchase bills, not being distressed men, need never be imposed upon. In the west-country thirty days is the usual time for which the bills are made to run; and sometimes money is given for those bills, when there is more money to be paid in *London* than there are bills upon that place. Considering the discount and remittance as separate transactions, and the jury having found a verdict agreeable to the evidence, I think we cannot meddle with it.

ROOKE J. I agree in opinion with my Lord and my Brother *Heath*. By the statute law of this land, it is usury to take more than *5l. per cent. per annum*. But where money is advanced under particular circumstances, a man may be warranted in taking more than *5l. per cent.*, if the surplus be taken for additional expence, risk, and trouble; generally speaking, where a party prefers taking bills instead of ready money, it would be right for the banker to say, "I will make a rebate for the time the bills have to run." But if he does so, he has a right to add, "I must have so much for my trouble and expences;" and on saying this, a new contract would commence, and it would be for the jury to determine whether a fair sum was taken or not. Here bills are brought to the banker to be discounted, and he asks, "How do you choose to take the money, in cash or in bills, and for what time?" The person who brought the bills, took part in cash and part in bills at different dates. It was left to the jury to consider whether this was not colourable, and more in fact taken for the commission than was proper; and the jury found that nothing more was taken than was reasonable. On a penal statute shall we be so strict for the purpose of defeating a fair claim? For I cannot but consider this defence in the same light as I should a proceeding on the other branch of the statute; and think the present transaction entitled to as favourable a construction as if it were the subject of a penal prosecution.

Rule discharged.

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A RULE was moved for by *Shepherd* Serjt. calling on the Plaintiff to shew cause why the entry of the judgment of *nolle prosequi* as to the first count of the declaration in this cause should not be struck out, or why the Plaintiff should not pay the costs of the count on which the *nolle prosequi* was entered.

The declaration was for goods sold and delivered, with a *quantum meruit* and the common money counts. In the first count it was by mistake stated, that the Defendant "was indebted for sold and delivered," leaving out the word "goods." This count was demurred to, and judgment recovered pleaded to the others; on which the Plaintiff entered a *nolle prosequi* as to the first count, and replied *nul tiel record* to the other pleas.

Shepherd contended that the Plaintiff's object was to deprive the Defendant of his costs on the demurrer, and cited *Cowper v. Tiffn*, 3 T.R. 511. where the 8 Eliz. c. 2. s. 2. was relied on; he said there were other cases where it had been held that after a demurrer, the Plaintiff cannot enter a *nolle prosequi*, *Rose & ux. v. Bowler*, 1 H.B. 108. *Drummond v. Durant*. 4 T.R. 360.

Le Blanc Serjt. shewed cause in the first instance, and endeavoured to prove that the object of the application made so late in the term was only to carry the cause over till next term. He urged that if the Defendant was entitled to any costs, they would be allowed on taxation after the trial of the cause, and that if the officer exercised his discretion improperly, then would be the reason to apply to the Court.

YEARE Ch. J. The single question is, Whether the Plaintiff has a right to enter a *nolle prosequi* in this stage of the proceeding? *Relicta verificatione non vult ulterius prosequi* is to be found in every book of entries. The right to costs is a matter for future consideration.

Shepherd Serjt. took nothing by his motion. (a)

(a) *Vid. Goddard v. Smith*, *Saxk.* 456. *Parker v. Sir T Lawrence and Nevil and Wood*, Hob. 70. *Slewley v. Eveley* ib. 18c. *Sir J. de Sands and Pastoral, Bruce's case*, 2 *Litt.* 177. After demurret in law joined, if the Court doth give a day over, at that day the Demandant or Plaintiff is demandable, and therefore may be nonsuit. *Co. Litt.* 139. b.

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KEATE v. TEMPLE.

On a motion for a new trial by a Defendant in an action against him for goods delivered to the use of a third person or his undertaking to see the Plaintiff paid, the Court will take into consideration not only the expressions used, but the particular situation of the Defendant at the time of his undertaking, and the amount of the sum for which he will thereby be made liable.

ASSUMPSIT for goods sold and delivered, work and labour, and common money counts.

Plea. *Non assumpsit.*

This cause was tried before Lawrence J. at Winchester summer assizes 1797, when the principal facts in evidence were as follow:

The Plaintiff was a tailor and slopseller at *Portsmouth*, and the Defendant the first lieutenant of His Majesty's ship the *Boyne*. When that ship came into port, the Defendant applied to a third person to recommend a slopseller who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The Plaintiff being accordingly recommended, the Defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" The Plaintiff answered, "Perfectly so." The cloaths were delivered on the quarter deck of the *Boyne*: slops are usually sold on the main deck: the Defendant produced samples to ascertain whether his directions had been followed: some of the men said, that they were not in want of any cloaths, but were told by the Defendant that if they did not take them, he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The cloathing of the crew in general was light and adapted to the climate of the *West Indies*, where the ship had been last stationed. Soon after the delivery, the *Boyne* was burnt, and the crew dispersed into different ships. On that occasion, the Plaintiff having expressed some apprehensions for himself, was told by the Defendant "Captain Grey (the Captain of the *Boyne*) and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the *Commerce de Marseilles* in order to pay the crew of the *Boyne*; at which time the Defendant stood at the pay table, and having taken some money out of the hat of the first man who was paid, gave it to the Plaintiff; the next man refused to part with his pay, and was immediately put in irons. The Defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

The

The learned Judge in his directions to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the Defendant as immediately responsible, the Plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furnished, the Plaintiff relied on being able, through the assistance of the Defendant, to get his money from the crew, they ought to find for the Defendant.

Verdict for the Plaintiff 576*l.* 7*s.* 8*d.*

A rule *nisi* for a new trial having been obtained on a former day by *Shepherd* Serjt. on the ground of the Defendant's undertaking being within the statute of frauds, (a)

Le Blanc and *Marshall* Serjts, now shewed cause, and contended that the only question in the case had been left to the jury, and decided by them, *viz.* Whether the sailors were liable in the first instance, and the Defendant only came in aid of their liability: or whether the Defendant was immediately responsible? They said that if the *Boyne* had been burnt before the delivery of the goods, the Plaintiff would have had no communication with the crew, and of course no ground of action against them; if therefore they were not liable on the original contract, the subsequent delivery would not shift the credit upon them.

Shepherd Serjt. in support of the rule, was stopped by the Court.

EYRE, Ch.J. There is one consideration, independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.* and this against a lieutenant in the navy: a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the Defendant to make himself liable, or of the *flopseller* to furnish the goods on his credit, to so large an amount. I can hardly think that had the *Boyne* not been burnt, and the Plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. The circumstances of this case create some prejudice against the Defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these cloaths against their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the service in which they

(a) 29 *Car. 2. c. 3. s. 4.*

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were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the Defendant and Captain Grey amounts to this, that when the men were to be cloathed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent that the men were to pay in the first instance: the Defendant's words were "I will see you paid at the pay-table; are you satisfied?" and the answer then was, "Perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, Whether the slopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of the evidence, and that the learned Judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.

HEATH J. I am of the same opinion.

ROOKE J. I am of the same opinion.

Rule absolute on payment of costs.

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MACDONALD v. PASLEY.

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THE Plaintiff had been a sailor on board the *Romney*, belonging to Commodore *Johnson's* squadron in 1781; the Defendant was the prize agent of that ship.

In 1789 the Plaintiff made the following note—

“ Liverpool, Nov. 23. 1789.

“ Please to pay to Mr. *Abraham Joseph*, or order, my share of prize-money for the *Romney*, for prizes captured by the fleet under Commodore *Johnson*, for which this shall be your discharge.”

“ From your humble servant,

“ To the agents for the

his

“ *Romney, London.*

“ JOHN + MACDONALD,

mark.

“ Witness, *W. L. Moyley.*”

All the prize-money due to the Plaintiff on account of the captures made in 1781, (which was payable by four instalments, viz. 3*l.* 4*s.*; 4*s.*; 2*l.* 15*s.* 6*d.*; and 3*l.* 2*s.* 6*d.*) had been paid to one *Grant* as indorsee of the above note; except the first instalment of 3*l.* 4*s.* The present action was brought by *Macdonald* against the Defendant, for the whole sum, and *Grant* at the same time claimed the 3*l.* 4*s.* still unpaid, as due to him.

A rule having been obtained to shew cause why, on payment of 3*l.* 4*s.* to such persons as the Court should appoint, all further proceedings on the action should not be stayed,

Adair, Serjt. shewed cause, and contended that the payments to *Grant* could not discharge the Defendant, since the note on which they were made did not comply with the directions of 26 Geo. 3. c. 63. (a), and 32 Geo. 3. c. 34. which were passed to

protect persons of money
due from the public to sailors and marines.

C. by virtue of an order from *B.* to receive all money due to him on a particular account obtains three out of four instalments due from *A.* to *B.* on that account; these payments are afterwards questioned by *B.* who brings his action against *A.* for the whole sum, and at the same time *C.* demands the 4th instalment; an application to the Court by *A.* to stay proceedings in the action against him by *B.* on his paying the 4th instalment to such person as they should appoint, was refused.

Sect. 2. That nothing but a power of attorney or will, complying with the provisions of 26 Geo. 3. c. 63. and 32 Geo. 3. c. 34. will warrant the payment to third persons of money due from the public to sailors and marines.

(a) By 26 Geo. 3. c. 63. f. 1. “ No letter of attorney or will made by any petty officer or seaman in the service of His Majesty, &c. to empower any person to receive wages, pay or allowances of money of any kind due for such service, shall be good, unless made revocable; if made by any such officer or seaman then in the service of His Majesty, &c. such letter of attorney or will must be signed before and attested by the captain, &c. and shall specify the name of the ship

and also the number at which the maker stands upon the ship's book; if made by any such officer or seaman discharged from the service of His Majesty, and within the bills of mortality, it shall be attested by an officer appointed by the treasurer of the navy; if at any of the ports where seamen's wages are paid, by the treasurer of the navy's clerk; if at any other place by the minister,” &c. By f. 2. “ every such letter of attorney or will shall contain the name of the ship

1797. protect sailors and marines from imposition. He insisted that if it was necessary to subject a letter of attorney to the restrictions of the above act, *a fortiori* it was so with respect to an order like the present, which was a less solemn instrument.

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Le Blanc Serjt. in support of the rule said, that the Defendant was ready to pay into court the $3l. 4s.$ for the benefit of those to whom it belonged: that in his present situation he must defend this action, with a certainty of paying costs to the Plaintiff, if he failed, or to *Grant* if he succeeded; and that as the acts alluded to only related to letters of attorney, they were out of the question in the present case.

EYRE, Ch. J. We ought not to decide against the Plaintiff on this summary application. If the sum of $3l. 4s.$ had been the extent of the Plaintiff's demand, and another person besides the Plaintiff had claimed it of the Defendant, he would then have been in the situation described: and having different claims made upon him for the same thing, it would be reasonable that he should be relieved. But that is not the state of the present case. Here the Plaintiff says, that all the money which has been paid to *Grant* has been paid by the Defendant in his own wrong. There is a great deal of colour for the argument which has been used respecting the nature of the authority under which these payments have been made. If the legislature thought fit to put a power of attorney under particular regulations, there is great reason to suppose that it was meant that the agent should not be discharged by any thing less than a power of attorney. The Defendant is not in that situation in which the Court ever does or can interfere. If he can shew that the payments have been made on good grounds he may then bring the $3l. 4s.$ into court.

Per Curiam,

Rule discharged. (a)

to which the person granting the same last belonged, the residence, profession, or business of the person in whose favour it is made, and the day of the month and place where it was executed." By 32 Geo. 2. c. 34. s. 1. these provisions are extended to marines; and by s. 2. "No letter of attorney or

order made by any petty officer, seaman, marine, &c. discharged from the service of His Majesty shall be good and valid, for receiving wages, prize-money, or other allowances of money due for such service, unless attested by a clerk of the treasurer of the navy, &c.

(a) *Vid. Turtle v. Hartwell*, 6 T. R. 426.

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SPARENBURGH v. BANNATYNE.

ASSUMPSIT for wages due to the Plaintiff as a seaman.
Pleas. 1st, *Non assumpsit.*

2d. That the Plaintiff is an alien, born in foreign parts, *to wit*, in *Holland*, in parts beyond the seas, out of the allegiance of the King of *Great Britain*, and within the allegiance of a foreign power, and that before the suing out of the original writ of the Plaintiff, and before the said day and year in the said declaration mentioned, *to wit*, on, &c. a public and open war was commenced, waged, and carried on, and from thence hitherto hath been, and still is waged and carried on, between our Lord the now King and his subjects, and the persons exercising the powers of government in *Holland* and the inhabitants and people of *Holland* under such government, *to wit*, at, &c. And that the Plaintiff before the said day and year in the said declaration mentioned, and at the suing out of the said original writ of the said Plaintiff, and also at the commencement of the said war, was and ever since has been and still is an enemy of our said lord the King, adhering to the persons so exercising the powers of government in *Holland*, and so being enemies of our said lord the King as aforesaid, *to wit*, at, &c. And this the Defendant is ready to verify: wherefore, &c.

3d Plea. The same as the second; only omitting "That the Plaintiff is an alien, born in foreign parts, *to wit*, in *Holland*, in parts beyond the seas, out of the allegiance of the King of *Great Britain*, and within the allegiance of a foreign power."

Replication. To the first Plea, joinder in issue.

To the 2d. Protestting that the said Plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar the Plaintiff from having and maintaining his aforesaid action against the Defendant; nevertheless, for replication in this behalf the Plaintiff saith, That he, before the making the said several promises and undertakings of the Defendant, in the said declaration mentioned, *to wit*, on, &c. was a prisoner of war, in custody of the forces of our Lord the King, in parts beyond the seas, *to wit*, at the island of *Saint Helena*, *to wit*, at, &c. and being such prisoner as aforesaid, he the Plaintiff then and there was, by and with the consent and permission of the commanding officer of

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 1 Taun. 28.

A native of a foreign state in amity with this country, taken in an act of hostility on board an enemy's fleet, and brought to *England* as a prisoner at war, is not disabled from suing while in confinement, on a contract entered into as a prisoner at war.

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the forces of our said Lord the King, at the island of *Saint Helena* aforesaid, hired, employed, and retained by the Defendant to serve as a seaman and mariner in and on board the said ship or vessel called the *Caledonia*, on his retainer, and at his special instance and request; and he the Plaintiff did then and there serve as such seaman or mariner in and on board such ship or vessel on a certain voyage whereon the said ship or vessel was then bound, *to wit*, from the island of *Saint Helena* aforesaid, to the port of *London* aforesaid, *to wit*, at, &c. Without this, that he the Plaintiff, at the time of suing forth the original writ of him the Plaintiff, was, or at any time hitherto hath been, an enemy of our said Lord the King, adhering to the persons exercising the powers of government in *Holland*, and so being enemies of our said Lord the King, as in and by the said plea is above alleged. And this he is ready to verify: wherefore, &c.

To the 3d Plea. Inducement and traverse, the same as to the 2d.

Rejoinder. Tendering issue on the traverses.

Surrejoinder. Joinder in both issues.

This cause was tried before *Eyre Ch. J.* at the *Guildhall* Settings after last *Trinity* term, when it appeared in evidence, that the Plaintiff, being a native of *Oldenburgh* in *Germany*, was taken prisoner at the *Cape of Good Hope*, he then serving as a sailor in the *Dutch* fleet under Admiral *Lucas*; that he was sent from the *Cape* to *Saint Helena*, in a *British* frigate, as a prisoner of war, and was there put on board the *Caledonia*, a *British* merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from *Saint Helena* to *England* he was treated like the rest of the crew, and did his duty to the satisfaction of the captain, the Defendant in the action; that on his arrival here, he was delivered over to the commissary with the other prisoners taken on board the *Dutch* fleet, and was at the time of the action brought in custody as a prisoner of war. Verdict for the Plaintiff, 24l.

Shepherd and *Heywood* Serjts. on a former day, moved for a rule to shew cause why the verdict should not be set aside, and a new trial be had; which was granted by the Court, after some hesitation.

Marshall Serjt. now shewed cause. FIRST, the Plaintiff being a *German* born is not an alien enemy within the legal acceptation of the term. Though there is no exact definition of alien enemy in any of the text writers, yet all the entries describe him in the same way. *Alienigena natus in regno Franciæ in com. de B. sub ligeantid*

ligeantia adversarii domini regis Angliae, de Francia, de patre et matre inimicis ipsius domini regis Angliae, et eidem adversario suo adherentibus oriundus, &c. *Rast.* 252. *3 Instructio Cler.* 16. That the place of birth is material appears from *3 Salk.* 28. *Comb.* 212. and *Carter* 48. and 191. in which last case it was objected, that the general averment of the Plaintiff's birth in the United Provinces was not sufficient, because there might be some place in those countries not under the jurisdiction of the King's enemies. **SECONDLY,** Supposing the Plaintiff a native of *Holland*, and taken in actual hostility to this country, yet under the circumstances of the case he is entitled to recover. Having entered into a contract with the license of the King's officer, that license may be presumed to have been given with the King's permission; and a license to contract, necessarily implies a license to sue. The plea of alien enemy is not now favoured by the courts. Formerly an alien enemy was disqualified in all cases, and his goods might be seized; the reason given was, that his property was forfeited as a reprisal for the damage committed by the enemy. *Gib. H. C. P.* 205. The reason at this day for the disability of an enemy is, that he shall not recover effects which, being carried from hence, may enrich his country: and it has been holden, that the subject of a power at war, who came here before the war broke out, or who comes here even in time of war, with the King's permission, may maintain an action. *Wells v. Williams*, 1 *Salk.* 46. Lord *Raym.* 282. The disability is now confined to two cases, viz. where the right sued for is acquired in actual hostility, *Arthon v. Fisher, Dougl.* 649. n.; and where the Plaintiff being an alien enemy is resident in the enemy's country. *Brandon v. Neſbit*, 6 *T. R.* 23. *Bristol v. Towers*, 6 *Term. Rep.* 35. **THIRDLY,** This defence is founded on an idea of a right in the conqueror to reduce his prisoners to slavery, which is contrary to the law of nations. If the commanding officer may compel the prisoners to labour, and subject them to punishment for disobedience of orders, there is nothing to prevent his selling them for slaves. Among barbarous nations prisoners of war are put to death with cruelty; in a more advanced state they are sold for slaves; among civilized nations both are disavowed, and their persons are only confined, till ransomed or exchanged. *Grotius de Jure Belli ac Pacis*, l. 3. c. 7. f. 9. If it be said that the Plaintiff has made himself an enemy by his own act, the answer is, that a person who owes no natural allegiance to the power at war with us, may by his own acts cease to be an enemy and become

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a friend; his character of enemy continuing no longer than while he adheres to the enemies of the King.

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Shepherd and Heywood Serjts. in support of the rule. Notwithstanding the language of the entries, there is no ground afforded by any of the text writers for supposing that the disability of an alien depends upon his birth. In *Co. Litt.* 129. b. an alien enemy is spoken of as "a subject to one that is an enemy to the King," not as a native of the country at war. Nor in the following books, *Thelwall's Dig.* l. 1. c. 4. 1 *Black. Com.* 372. *Terms de la Ley*, 36. *Fest. C. L.* 185. *H. P. C.* 164., which treat of alien enemy, is any mention made of birth. It is true that birth raises and perpetuates the character of alien enemy; for by the law of England allegiance always follows the person; and if by the law of any other country the party could rid himself of his allegiance by his own act, it ought to be replied that he had done so. The circumstance of birth however is no farther material than as it is one of the cases which constitute alien enemy, and even that is not decisive; for Lord Holt says that a person may be born in a country at enmity with us, and yet *infra legeantiam Angliae*; and he instances the attendants of an ambassador. *Comb.* 212. Now the present Plaintiff, when he accepted a commission from the Dutch government, (for the commission of the ship is his commission,) became a subject of Holland, owed allegiance to Holland, and was liable to be prosecuted for the breach of it as a traitor. If then the Plaintiff ever became a subject of Holland, the next question is, how far that character has been altered by subsequent events? A prisoner at war must be considered as much the subject of the country from which he was taken, as when he was in actual service: and his detention is justified on no other principle than that of preventing such country from having the benefit of his service again. If he be released, he will become *sui juris*, and may put off the temporary allegiance which he owed to the country under which he served: but the period is not arrived at which the present Plaintiff is become *sui juris*. The conqueror might have slain him in battle: now the mercy of the conqueror has not changed his character; but it continues the same in prison, as when no mercy had been extended to him. The Plaintiff is not treated as a neutral in this country, nor does that character attach while he continues a prisoner: if he endeavoured to escape and was shot in the attempt, the soldier shooting him would not be tried by the municipal law. He is confined and fed like any of the

the other *Dutch* prisoners. Indeed it is said, *Vattel*, l. 3. c. 15. f. 230. that "volunteers taken by the enemy are treated as if part of the army in which they fight." The reason why no other plea is to be found in the entries than that of alien enemy *née*, is because no other person coming under the description of alien enemy could be resident here. If an action be brought by a native of an hostile state, the Defendant may plead alien enemy on the discovery of the Plaintiff's birth: but any other alien becomes *sui juris* by residence, except in the present case of a prisoner at war. The only remaining question relates to the license of the officer. The act of an individual can no more remove the disability of an alien enemy to contract, than it can create the character of alien enemy. *Bro. Abr. Denizen*, pl. 20. Unless this were so, any *Englishman* by contracting with an alien enemy might relieve him from that character: but license is an act of state. Besides, if license is to be relied on, it should have been pleaded. 7 *Mod.* 150. 1 *Ld. Raym.* 282. In *Brandon v. Nesbitt*, 6 *T. R.* 23. there were two pleas exactly similar to the second and third in the present case, and though they were demurred to, the Defendant had judgment.

EYRE Ch. J. The question is, Whether on the evidence produced in this case the Plaintiff is to be considered as an alien enemy at the time when the writ issued? If he must be so considered, I take it to be a necessary consequence that this action must fail. The fact is, that this man, being a native of some part of *Germany*, and therefore a neutral by birth, was found on board a ship belonging to the enemies of this country, and was captured in actual hostility. What then is his situation? Having been taken in the act of hostility, he is either a pirate, or *quoad* that act of hostility a subject of the prince or power under whose commission he acted. No doubt, this man being a neutral by birth committed an act of hostility against this country, under a commission from a state at war with this country. So far I take to be clear. I therefore go a great way with the Defendant's counsel, who have argued that at this day the form of the plea of alien enemy, which states the party to be alien enemy born, is not absolutely necessary to be adhered to in exclusion of every other case of enmity. In the course of the argument we have had many reasons and authorities adduced to shew, that if a man is really to be considered as alien enemy, though not a native of the country at war, he is so to be considered as to all the consequences which apply to alien enemy by birth. But here the

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Plaintiff became an enemy in consequence of having participated in one single act of hostility. Now suppose it had been the pleasure of this state to shew him favour. Suppose this had been said, " You are a neutral, and perhaps have been drawn into the act in which you were engaged : you are at liberty to return to your own country, or you may remain here, as you are the subject of a prince in amity with us." It has been admitted in argument, that as soon as he should become *sui juris*, the character of enemy would be purged. If then the Crown had not thought fit to hold the Plaintiff prisoner at war, he could not have been considered as sustaining the character of enemy, but would have been treated as the subject of a state in amity with this country. The difficulty of the case, if there be difficulty, arises from the Plaintiff having been detained as prisoner at war : it has been contended that if, at the moment of capture, he was alien enemy, that character must continue till he ceases to be prisoner at war. That part of the argument I never was satisfied with; I cannot deny that he was captured as alien enemy; at that moment he was so: but how came he to be so? Not in consequence of any permanent character of enemy, but because he had joined in one act of hostility, for which act he is not, according to the rigour of ancient war, put to the sword, or delivered into the hands of the individual who took him prisoner, to be kept prisoner by him, till he should receive the ransom ; but he remains in the hands of the King till he is ransomed by an exchange for the benefit of the state, or set at liberty by the King's command. But how does this tend to fix on him the permanent character of alien enemy ? That character arises from the party being under the allegiance of the state at war with us ; the allegiance being permanent, the character is permanent, and on that ground he is alien enemy, whether in or out of prison. But a neutral, whether in or out of prison, cannot, *for that reason*, be an alien enemy ; he can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us ; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable? Captain Vaughan (a)

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(a) 5 State Trials, p. 17. No. 162.

was not an alien enemy, but being a natural born subject of this realm, he became a traitor; for that he was put in prison, for that he answered, and with his life. But it was for that act of hostility merely. With regard to his character of a subject, he remained, till the moment of his execution, as if that act had never been committed. There is very little light to be procured from our books, to assist us in our inquiry, how far a neutral joining in an act of hostility is to be considered as having acquired the character of alien enemy. The subject was indirectly discussed in the case of Captain *Vaughan* to which I have alluded. He was charged in the indictment (a) with adhering to the King's enemies, by cruising *cum subditis Gallicis*; the fact was, that many of his crew were not natural born subjects of the French King, but *Hollanders*. It was made a question whether the *Hollanders* could be called *subditi Gallici*; and though the point was not authoritatively decided, because some of the crew were certainly French, which was sufficient to support the indictment, yet it was held by *Holt Ch.J.* and agreed to by the rest of the Court, that the *Hollanders* by accepting a commission from the French King became *subditi Gallici* and so remained, *during the continuance of their service*, in a state of qualified subjection, arising out of the service and determining with it. This, had it been the very point in judgment, would have gone a great way towards deciding the present question. The commission under which the Plaintiff, being a German, acted, was put an end to by the capture of the frigate in which he was. After that time he had no opportunity of continuing in the service of the State of Holland; and his temporary character of alien enemy ceased and determined with the authority under which he acted. Captain *Vaughan*'s case, as far as it goes, draws a line, and fairly marks out when that character begins, and when it shall end. I am of opinion that it is determined by the very nature of the subject, and being so determined, why should we desire to enlarge the disability of the Plaintiff, or continue it, until the war is concluded? Why, but in order to let in one of the harshest, one of the most impolitic, nay immoral defences that ever was set up in a court of justice? This man, whether he was under a safe conduct or not, did his duty faithfully, and was duly approved of by the officer of the *Caledonia*. That ship was in such distress, that she was, as it appeared at the trial, under the necessity of taking in more hands at *Lisbon*, and probably would have

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been lost without such assistance as was afforded by the Plaintiff. He now only asks for a moderate reward, and is paid with a plea of alien enemy. This is certainly one of the hardest cases I ever knew, and I think we ought to lean against it. And if a distinction is to be found between the permanent character of alien enemy, to which the courts of justice cannot give protection, and the temporary character, we shall readily adopt it. As to the ground of policy which has been taken in argument for the Defendant, namely, that a benefit would result to the enemy from the Plaintiff's recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not therefore good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience. As the real justice of the case is with the verdict, and a legal distinction to exclude this unworthy defence can fairly be maintained, I think no new trial should be granted.

HEATH J. I am quite of the same opinion with my Lord, and I am glad that some legal ground can be found, on which we may repel this dishonest defence. I will first consider, Whether, in a plea of alien enemy, it is necessary to state that the Plaintiff is alien enemy by birth? The forms of pleading have always been considered as strong evidence of the law, and it is said that they all aver that the party was born in the country at war with us. But I observe that in *4 Mod. 405.* where the plea was "*alienigena in regno Franciae sub ligantia adversarii domini regis, &c. oriundus,*" exception was taken on demurrer that it ought to have been *natus*, and some precedents being cited out of *Ratall*, where the word "*natus*" was supplied by "*oriundus*," the plea was held good. Next, as to the general question, the pleas state that the Plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the

the King's enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason^(a); if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility. It has been said, that a prisoner at war cannot contract; his case would be hard indeed if that were true. Officers on their parole must subsist like other men of their own rank; but according to such doctrine they must starve; for they could gain no credit if deprived of the power of suing for their own debts. It has also been urged, that if the Plaintiff was under a protection, that circumstance ought to have been pleaded, and this is true of a formal protection under the great seal; but there may be a protection arising from situation, which need not be pleaded. If a prisoner of war is in confinement, he is protected as to his person; if he is on his parole, he requires further protection than what relates merely to his person. The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted. I will add one case to shew that a prisoner at war may sue and be sued. The son of the celebrated *Mississippi Law* was brought over here as a prisoner at war, and being on his parole, was arrested for 10,000*l.* by the executor of a creditor, who swore that he was indebted as appeared by the testator's books; he was discharged however, not because he was a prisoner at war, but because the executor had not inserted in his affidavit that he was indebted "as he believed." If a prisoner of war can be sued, there is no reason why he should not sue. How is it with felons? They may be charged in execution, and yet their bodies are at the King's disposal. For these reasons I think the Plaintiff, being a prisoner at war at the time of making the contract, may maintain an action on that contract, and is protected by law.

ROOKE J. This question does not come before us upon demurrer, but on the single point whether the issue is rightly found. The defence has no foundation in conscience, in justice, or in public policy, and I do not feel disposed to assist it. An enemy under the King's protection may sue and be sued: that cannot be doubted. A prisoner at war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his

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(a) Peter Moliereo, a French prisoner, was indicted for privately stealing in a jeweller's shop. Sir Michael Foster thought it improper to proceed capitally against him upon a local statute, and directed the jury to acquit him of privately stealing, but to find him guilty of simple larceny. *Agst. 188.*

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parole is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him, and refuse either to advance the money or return the pledge. Surely the Court would say that he might recover his ring or his jewel from the tradesman. The present Plaintiff has in fact done much the same thing. Under the licence of the King's officer he pledged his labour at *St. Helena*, in order to procure a more comfortable subsistence. Accordingly he worked his way over, and earned a reasonable compensation. That being the case, I see no reason why he should not recover, even if he were alien enemy *born*. But as my Lord has not thought proper to go so far, I speak to that point with diffidence; and shall rather avail myself of the distinction which has been drawn between the temporary and permanent character of alien enemy; laying in a claim however, to say, at any future day, that a person in the situation of the Plaintiff is like the officer who pledges his jewel; for this contract was made under the licence of those who had authority to license the contracting party.

Rule discharged.

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2 B&F. & P.ull.

331.

Park. Inf. 218.

In an insurance on a ship at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, the voyages from *Hull* to *Portsmouth*, mouth where she meets with convoy, and from thence to *Bilboa*, may be considered as distinct, and in case of a loss between the two latter places, an apportionment and return of premium may be demanded.

ROTHWELL v. COOKE.

THIS was an action on a policy of insurance on the ship *Manning* at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy: the declaration also contained a count for money had and received.

The cause was tried before *Eyre Ch.J.* at the *Guildhall* Sittings after last *Easter term*, when it appeared in evidence that the ship sailed from *Hull* to *Portsmouth*, and from thence departed with a convoy, which, not being direct for *Bilboa*, she afterwards left, and was captured; on this evidence the Plaintiff would have been nonsuited; but on his counsel insisting that he was entitled to a verdict for the premium, which had not been returned, under the count for money had and received, a verdict passed for the Plaintiff for the whole premium.

To set aside this verdict and enter a nonsuit, a rule *nisi* was obtained by the Defendant in *Trinity term* last, on the ground of the risk having commenced.

Le Blanc Serjt. in the same term shewed cause. I contend that there were two risks; one from *Hull* to the place where the convoy was to be met with, and another from thence to the port of discharge.

discharge. In *Stevenson v. Snow*, 3 *Burr.* 1237. 1 *Bl.* 315. 318. the premium was apportioned on this ground. In that case, though a usage was found by the jury, yet it was disclaimed by the Court as the foundation of their opinion. Lord *Mansfield* said, in the case of *Long v. Allen*, *Park.* 390. "My opinion has been to divide the risks." The doctrine of these cases was attempted to be controverted when this rule was first granted by the three cases of *Tyrie v. Fletcher*, *Cowp.* 666. *Lorraine v. Tomlinson*, *Doug.* 585. and *Bermon v. Woodbridge*, *Doug.* 781. The first of these is distinguishable from the present as having been an insurance for a term of twelve months, and the ship captured at the end of two; the Court there recognised the case of *Stevenson v. Snow*, but thought the case under their consideration not within its principle. The second was also an insurance for time; in such cases there can be no division of risk, for if the principle were once admitted, no line could be drawn; since if the premium were apportioned for each month, it might as well be apportioned for each week or each day. The third, which was a policy at and from *Honfleur* to the coast of *Angola*, during the stay and trade there, at and from thence to *St. Domingo*, and at and from *St. Domingo* back to *Honfleur*, was decided on the ground of the risk having been considered by the parties, as one entire risk and not divisible, especially as there was no contingency mentioned on the happening of which the insurance could be put an end to. *Stevenson v. Snow* was also recognised in that case. Here two voyages are imported on the face of the policy; the risks are of different natures, one being without convoy, the other with. If this were not the case, the going into a particular port, as *Portsmouth*, would be a deviation from the original voyage from *Hull* to *Bilboa*.

Shepherd Serjt. in support of the rule. Two cases have been relied on, *Long v. Allen* and *Stevenson v. Snow*. In the first an express usage was found by the jury, which must have been supposed to have been known to the parties, and therefore incorporated into the contract. In the latter also a usage was found by the jury; and though the Court rejected it for uncertainty, yet Lord *Mansfield* says, in *Tyrie v. Fletcher*, that "they argued from it that there being such a custom plainly shewed the general sense of merchants as to the propriety of returning a part of the premium in such cases." The principle of the cases, of policies for time does not differ from the present; and Lord *Mansfield* says, in *Bermon v. Woodbridge*, "if you could apportion the premium in any case, it would

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would be in insurances upon time." On the face of this policy there are not two voyages, unless it be considered as a general rule that there are two voyages wherever the convoy is not appointed at the port of loading.

EYRE Ch. J. We will consider of this case. Either the voyage insured is to be considered as in effect two voyages with two distinct premiums, or one voyage only with one premium. Supposing there were two voyages; if the ship had been lost on the first, there ought to be a return of premium upon the second; but I cannot think that in such a case a return would have been demanded. *Bermon v. Woodbridge* is very strong against two voyages; the outward bound voyage might there have been considered as a distinct risk; and if it was there thought that no return should be made, it shakes the principle of *Stevenson v. Snow*. Before we decide in favour of a return, we must see distinctly that there were two voyages and two distinct premiums consolidated into one.

HEATH J. It is difficult to reconcile the cases on principle. One went on usage; in *Stevenson v. Snow*, on the other hand, usage was disclaimed; and yet the Court relied on the opinion of all mankind, which is usage.

ROOKE J. As these contracts are entered into every day, we ought to adhere to the decisions on the point. Where the Courts have decided against a return of premium, they have distinguished the cases from *Stevenson v. Snow*. It has been the course of construction to divide such a policy as this into two voyages. If the ship does not depart from *Portsmouth* with convoy, the contract ceases as to the latter part, though it remains good as to the former. The word *England* here answers to the word *Portsmouth* in other cases. As the Courts have been anxious not to overturn *Stevenson v. Snow*, I should be unwilling to do what they have avoided. That case is probably considered as law at *Lloyd's* coffee-house.

Cur. adv. vult.

Early in this term the Court recommended the parties to compromise the matter. In consequence of which it was not mentioned again till this day, when the Court finding on inquiry that it had not been settled,

EYRE Ch. J. said, The verdict now stands for the return of the whole premium, and the question is, Whether it should stand for the whole, for none, or for a part? If for a part, I do not know how we are to settle it; it must depend on there being or not being some

some rule to be found to direct us in making the decision. Certain it is, that if the ship had been lost in coming round to *Portsmouth*, the underwriters would have been liable; it is not therefore reasonable that they should have been so liable without retaining a proportion of the premium. You should inquire whether there is any rate of premium among the underwriters from *Hull* to *Portsmouth*, and whether the premium has ever been apportioned where there has been only one insurance, without distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned; and therefore the present verdict must be set aside, and the cause go to a new trial.

Per Curiam,

Rule absolute.

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ATKINSON v. ABRAHAM.

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6 P. C. Jan. 72.

WILLIAMS Serjt. moved for a rule to shew cause why an award made in consequence of a reference in an action of trover for a ewe and lamb, at the last *Lent* assizes, before *Thompson* B. should not be set aside.

The ground of the application was this: After the evidence before the arbitrator was closed on both sides, and the Plaintiff's attorney was gone, one of the Defendant's witnesses was re-examined, and gave a testimony different from that which he had given before, and by which the arbitrator confessed his judgment was influenced.

Sed per Eyre Ch. J. Upon what ground in law is it that the second examination will impeach this award? This is clear, that if the arbitrator thought proper to ask the witness a question for his own information after the evidence was closed, that circumstance will not induce us to set aside the award. If indeed it appeared that there was any surprize in it; that the second examination had been brought about through the management of the Defendant's attorney, that might be a good ground of objection. Besides, this seems a matter of too little consequence to be opened again.

Per Curiam,

Rule refused.

It is no ground for setting aside an award, that one of the Defendant's witnesses was re-examined by the arbitrator after the evidence was closed on both sides, and the Plaintiff's attorney gone, though by a different testimony from what he gave at first the arbitrator's opinion was influenced: Unless such re-examination was brought about by the management of the Defendant's attorney.

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2 New Rep. 240.
The Court will discharge a Defendant out of custody who is in execution at the suit of a Plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family, on notice of a motion for the above purpose, declines interfering.

BROUGHTON v. MARTIN.

SHEPHERD Serjt. on a former day moved for a rule to shew cause why the Defendant should not be discharged out of custody, on an affidavit, stating that he had been three years in execution at the suit of *Delves Broughton* Esq. who died at *Gibraltar* fifteen months previous to this application, and that he had caused a search to be made in the Commons, the result of which was, that no will had been proved there, nor any administration granted.

At first the Court doubted; but afterwards granted a rule nisi, directing, at the same time, that it should be made part of the rule, that notice of the present motion should be served on the attorney of the *Broughton* family.

On this day *Shepherd* mentioned this matter again, and cited the case of *Wagstaffe v. Darby*, 1 *Barnes*, 366.; and the attorney for the *Broughton* family attending and informing the Court that the relations of the deceased declined interfering, and had not taken out, and did not mean to take out letters of administration,

The Court said, they wanted nothing but precedent to warrant them in doing what was desired, as it was a reasonable thing to be done; and that as the *Broughton* family had received notice, and there was no probable ground to suppose that administration would be taken out, they thought they might make the

Rule absolute.

Nov. 28th.**CROOKS ONE, &c. v. HOLDITCH.**

Bailable process was issued out previous to the passing of the 37 G. 3. c. 45. which regulates the form of the affidavit to hold to bail; this process was renewed four several times without any new affidavit, and the 4th renewal, on which Defendant was arrested, was subsequent to the passing of the above act; and held no objection to such process that it was founded on an affidavit not complying with the 37 G. 3. c. 45.

COCKELL Serjt. shewed cause against a rule nisi for entering a common appearance, the affidavit to hold to bail having omitted to negative a tender in bank notes.

The affidavit was made on the 10th *March* 1796, on which a writ of attachment of privilege was issued out; but the Plaintiff not having been able to arrest the Defendant before the return of that writ, renewed his process four several times; the last process was taken out after the passing of the Bank Act, 37 G. 3. c. 45. and the Defendant was actually arrested on 5th *July* 1797.

Shepherd Serjt. in support of the rule. It does not appear on the face of the process on which the Defendant was arrested, that any

any former process had issued. The *præcipe* was "attachment for *William Crooks Gent. one, &c. against, &c.* Oath 1*l.* and upwards." The question is, Whether a new affidavit made according to the directions of the act, was not necessary, when the last process was sued out?

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EYRE Ch. J. The continuances ought to have been by *alias* and *pluries*; and though these subsequent writs may, by mistake, have issued in the form of first process, yet in the nature of the thing, they must be considered as continuances. If the affidavit was regular at first, no new affidavit can be requisite. We cannot say that what once was regular, is irregular now, because an act of parliament has intervened. That act requires, that with respect to all holding to bail on affidavit, subsequent to the date of it, the affidavit shall express so and so, which cannot apply to regulate the form of an affidavit made before the passing of the act. We must adopt a construction which does not require impossibilities.

Per Curiam,

Rule discharged.

FRANCISCO v. GILMORE.

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The Defendant was captain of the *Eliza-Anna*, an *India* country trader, and the Plaintiff one of her crew. It is the custom of the *India* country trade for the captains of ships to contract with a person called a *Serang* (or captain of an *Indian* crew) for a number of seamen, for whom he pays the *Serang* at a certain rate *per man per month*; the captain is not answerable to the crew for their wages, but to the *Serang* alone, to whom the crew look for payment. In this manner the Defendant contracted with a *Serang* at *Bengal* for a crew; his ship was then taken up by the government of that country, and sent to *England* with rice; having landed her cargo here, she was sent with troops to the *West Indies*, and from thence back again to *England* with invalids. Being again arrived here, the Plaintiff, together with eighteen other seamen, quitted the ship, and commenced actions against the Defendant for wages; to which he put in bail, and soon after sailed for *India*, with the *Serang* and the rest of the crew on board.

Shepherd Serjt. on a former day moved, that a writ in the nature of a *mandamus* might issue in this cause, directed to the mayor and aldermen for the time being, being the judges of the mayor's court at *Bombay* in the *East Indies*, commanding them

A. captain of an India country trader contracts in India with B. for a crew according to the custom of the country; A. arrives in England with the crew, and then makes a voyage with them to the West Indies and back again; action by part of the crew for wages due on the West Indies voyage; and held on motion for a mandamus to examine witnesses in India, that the cause of action did not arise in India, within 13 G. 3 c. 63. / 44.

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the said mayor and aldermen to hold a court for the examination of witnesses on the part of the Defendant in this cause, and for receiving proofs in this cause pursuant to the directions made in the 13th year of the reign of his present Majesty (a), and to perform all such other matters and things as by the directions of the said statute are required, and that the depositions taken in manner aforesaid might be transmitted, under seal of the said Court, to one of the secondaries of this honorable Court, and that the same might be read and given in evidence in this cause, and that the trial of this cause might be put off until after the return of the said writ.

The grounds of the application were, that the contract with the *Serang* in *Bengal* was the cause of action, and that the *Serang*, and many of the crew, who were natives of *India*, and resident there, were material witnesses in the cause.

The Court granted a rule *nisi*, but directed that notice should be given to the Solicitor of the *East India* Company of the situation of the Plaintiff and the other eighteen seamen.

Cockell and *Marshall* Serjts. now shewed for cause affidavits stating the circumstance of the *West India* voyage, which had not been disclosed by the original affidavits; and that the action was brought for wages earned during the voyage from *London* to the *West Indies* and back again; and they contended, that the cause of action arose in *London*, and not in *India*, and therefore did not come within the meaning of the act.

Adair Serjt. for the *East India* Company, said, that the Company, on application, always relieved the distress of persons in the Plaintiff's situation, and not only those who were in their own service, but frequently those left here by foreign ships.

In support of the rule, *Adair* and *Shepherd* insisted, that although the voyage to the *West Indies* was not in the contemplation of the parties when they left *India*, yet that as the Defendant had contracted with the *Serang* for each man at a rate *per month*, it was a general contract, not limited to any particular voyage; and

(a) By 13 Geo. 3. c. 63. s. 44. it is enacted,
"That when and as often as the *India* Company, or any person or persons whatsoever, shall commence and prosecute any action or suit in law or equity, for which cause both arifen or shall hereafter arife in *India*, against any other person or persons whatsoever in any of His Majesty's courts at *Weyminster*, it shall and may be lawful for such Court respectively, upon motion then made, to provide and award such writ or writs in the

nature of a mandamus or commission, to the chief justice and judges of the supreme court of judicature for the time being, or the judges of the mayor's court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, for the examination of witnesses as aforesaid, and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action."

that the testimony of the *Serang* was indispensably necessary to ascertain whether the *West India* voyage came within the contract made in *Bengal* or not.

EYRE Ch. J. It may perhaps be true, that these persons were ill-advised in not applying to the *East India Company*, who might have taken them under their protection. If the Company had been apprized of the nature of their case, they never could have been treated as they have been. As it is, they have put themselves into the hands of the gentleman who conducts their cause; and the question for our consideration is, Whether the present application is such an one as we ought to grant for the furtherance of justice? One of the affidavits on which the rule was granted, states it to be the usage of the country trade of the *East Indies* for the captain to contract with a *Serang*, who undertakes to provide men at his own risk, and receives the payment stipulated by the captain. If this were such a contract, founded on this usage, it might be a contract to be proved by evidence in *India*. With respect to the residence of the witnesses in *India*, I really thought that the *Serang* was not only resident there, but had never left it; and if we had not thought so we never should have granted a rule to shew cause; but now it turns out, that he has not only been in *England*, but has lately quitted this country in company with the Defendant. The affidavits on which the rule was obtained did not inform us, what the voyage was on which the wages arose; we could not say with certainty that it was even a voyage out of the country trade. I took it for granted, because it is a case familiar to me, that the *East India Company* had chartered a country trader to come to *England*, and return to *Bengal*, which is not uncommon under some particular pressure or emergency. I thought that the contract in question might have been conducted in this manner, and that the *Serang* (always supposing him to have been resident in *India*) was the only person who could give evidence of it. Little did I dream of a case in which, under colour of a bargain not unusual respecting country ships, these poor men had been dragged to the *West Indies*, and that the wages now sued for arose on a voyage to and from the *West Indies* only. This part of the case was carefully kept back, and how the Defendant's agents could think themselves at liberty to suppress this fact I am at a loss to conceive. It is possible to suppose that a usage in the *India* country trade, or a contract made in *India* founded upon that usage, could be intended to extend to such a transaction as this, where the men have been

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taken to a different destination from that originally in view, and kidnapped, as it were, to the *West Indies*, having had no idea that such a voyage was to be included in the contract made in *Bengal*? As soon as the Court is informed of these circumstances, it must see that it has not any jurisdiction whatever to grant the writ in question. The cause of action did not arise in *India*. The only ground on which we could put off the trial is the absence of a material witness; to do this, we must take the circumstances of the case into consideration, and inquire into the probability of the *Serang's* return to *England*; but here we learn that he is but just departed from this country in company with the Defendant himself, having been here in his power since the commencement of the action. Besides I much doubt whether we should ever get the *mandamus* executed even if we had the power to grant it; the *Serang* is a mariner, and probably is gone elsewhere beyond the reach of those to whom we might direct our writ. This is one of the grossest suppressions of the real case that I ever saw in a court of justice, and I think therefore that the rule should be discharged with costs, to mark the disapprobation of the Court as much as possible.

Per Curiam,

Rule discharged with costs.

2 *B&F*, 12.6 *B&F*, 419.In an indictment
on 37 Geo. 3.c. 70. it is suffi-
cient to charge
an *endeavour* to
incite, &c. with-
out specifying the
means employed.Under a charge that *A*. endeavoured to incite *B*. to mutiny, being a soldier, knowledge of *B*'s being a soldier is implied. The word *advisedly* in such a case is equivalent to *scienter*.*Semb.* That if one *endeavour* comprise two separate offences a count in an indictment charging that *endeavour* may contain those two offences.

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RICHARD Fuller was indicted at the *Old Bailey* sessions in *July* last, on 37 Geo. 3. c. 70. (a)

The indictment stated, That *Richard Fuller* being a wicked and evil disposed person, after the passing of a certain act of parliament made in 37 Geo. 3. intitled, "An act for the better prevention

(a) The preamble of that act states,
"That whereas divers wicked and evil-dis-
posed persons, by the publication of written
or printed papers, and by malicious and ad-
vised speaking, have of late indisputably
endeavoured to seduce persons serving in
His Majesty's forces by sea and land from
their duty and allegiance to His Majesty,
and to incite them to mutiny and disobe-
dience;" it then enacts, "that any person
who shall maliciously and advisedly endea-
vour to seduce any person or persons serving

in His Majesty's forces by sea or land,
from his or their duty and allegiance to His
Majesty, or to incite or stir up any such
person or persons to commit any act of
mutiny, or to make or endeavour to make
any mutinous assembly, or to commit any
traitorous or mutinous practices whatsoever,
shall, on being legally convicted of such
offence, be adjudged guilty of felony, and
shall suffer death as in cases of felony with-
out benefit of clergy."

and

and punishment of attempts to seduce persons serving in His Majesty's forces by sea or land, from their duty and allegiance to His Majesty, or to incite them to mutiny or disobedience," and whilst the said act continued and was in force, to wit, on, &c. at, &c. feloniously did maliciously and *advisedly endeavour* to seduce *Matthew Lowe*, he the said *Matthew Lowe* then and there being a person serving in His Majesty's forces by land, from his duty and allegiance to His said Majesty, *contra formam, &c. contra pacem, &c.*

The 2d count stated, That he feloniously did maliciously and *advisedly endeavour* to incite and stir up the said *Matthew Lowe*, he the said *Matthew Lowe* then and there being a person serving in His said Majesty's forces by land as aforesaid, to commit an act of mutiny, and to commit traitorous and mutinous practices, *contra formam, &c. contra pacem, &c.*

The prisoner was convicted; but objections being taken in arrest of judgment, and referred to the twelve Judges, they were argued in this term (*absente Buller J.*) in the Exchequer chamber.

Gurney for the prisoner. 1st, The indictment does not state in what manner and by what means the prisoner endeavoured to seduce *Matthew Lowe* from his duty and allegiance, as charged in the first count, and to incite him to commit an act of mutiny, and to commit traitorous and mutinous practices as charged in the second count. 2dly, The indictment does not aver that the prisoner knew *Matthew Lowe* to be a person serving in His Majesty's forces by land. 3dly, The second count comprehends two distinct offences, which ought to have been charged in separate counts.

1st, The preamble of the act recites the mischief for which it provides a remedy; and states, that the mischief had been effected in two ways; by the publication of written or printed papers, and by malicious and advised speaking. In this case, which occurred only two days after the act passed, the mischief was attempted in the first mode, namely, by publishing and delivering two seditious hand-bills: those hand-bills then ought to have been set out in the indictment, the publication of which to *Matthew Lowe* was the act done, that constituted the *endeavour* charged. The prisoner had not sufficient notice, from this indictment, of the charge he was to encounter. He may have supposed that the evidence against him would consist of conversation, and have been prepared to repel that, when in fact it consisted of the publication of papers, which he was not prepared to repel. Or he might have been prepared to meet evidence of the publication of

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papers, and have been surprised by evidence of conversation. Possibly also, the grand jury may have found the bill on evidence of malicious and advised speaking, and the petit jury have given their verdict on evidence of the publication of seditious papers: in which case the prisoner will not have had the advantage of the concurrent opinion of the two juries. By analogy to other cases it will appear, that the certainty which this indictment wants has been held to be necessary. In indictments for procuring money, &c. by false tokens, on 33 Hen. 8. c. 1, it is not sufficient to pursue the words of the act, and aver that the Defendant "did falsely and deceitfully obtain possession of money, &c. by means of a false token," but the indictment must state what he did obtain, and what false token he employed; and for this reason, that the Defendant may be apprised of the charge he is to meet. *Rex v. Munoz*, 2 Str. 1127. On the same principle the same rule has been laid down in the case of indictments under 30 Geo. 2. c. 24. for obtaining money or goods by false pretences. *The King v. Mason*, 2 T. R. 581. In *Hawk. P. C. lib. 2. c. 25. f. 57.* it is said, "That an indictment finding that "a person hath feloniously broken prison, without shewing the "cause of his imprisonment, &c. by which it might appear that "it was of such a nature that the breaking might amount to "felony is insufficient; also indictments against persons for re- "fusing to be sworn constables after they had been *legitimo modo electi*, have been quashed, for not shewing the manner "of the election, that it might appear to have been such as "obliged the Defendants to have undertaken the office." *Rex v. Harpur*, 5 Mod. 96. In *Davy v. Baker*, 4 Burr. 2471. which was an action on 32 Geo. 2. c. 24. for preventing bribery at elections, judgment was arrested because the declaration averred that the Defendant "did receive a gift or reward," without specifying what.

2dly, It never could be the intention of the Legislature to punish with death an act of this nature, unless the man who was guilty of it knew that the person whom he was endeavouring to seduce or incite came within the meaning of the statute. If it should be thought that a feeble presumption repels this objection as far as regards the second count, because it may be said that a man could not be incited to an act of mutiny, who was not in His Majesty's military or naval service, and known to be so by the prisoner; yet the 1st count, which only charges an endeavour to seduce *Matthew Lowe* from his duty and allegiance to His Majesty, affords

affords no presumption of that kind. Allegiance is equally due from all subjects, and therefore the prisoner may have done all that is charged in this count, without knowing *Matthew Lowe* to be a soldier. However, even as to the 2d count, the objection is fatal; for in capital cases the want of specific averments is not to be supplied by implication. The word "advisedly" means nothing more than deliberately, and cannot be held equivalent to the word "knowingly."

3dly, The act creates four distinct offences. 1st, Endeavouring to seduce a person serving in His Majesty's forces by sea or land from his duty and allegiance. 2dly, Endeavouring to incite such person to an act of mutiny. 3dly, Endeavouring to incite him to make or endeavour to make a mutinous assembly. 4thly, Endeavouring to incite him to commit any traitorous or mutinous practice. If two of these offences can be charged in one count, so may all four; or even forty, if the statute had created so many, however inconsistent they might be. Besides, this is a case in which the Judges will hold the Crown to a strict definite mode of charge; more so even than in the cases cited, as this is a capital felony: perhaps more so still, because this is a temporary statute, and a measure of extraordinary rigour.

Abbott on the part of the Crown. The first objection, which is the most material, I shall consider last, and proceed to the second. It is stated in both counts, that the prisoner did *advisedly* endeavour to seduce or to stir up *Matthew Lowe* being a soldier. Now the word *advisedly* is at least of as strong import as the word *scienter*, and that has been held sufficient in similar cases. *Hawk. lib. 2. c. 25. f. 67. Rex v. Thomson, 2 Lev. 208. Rex v. Lawley, Fitz. 122. 263. 2 Str. 904.* in which last case the words "knowing *I.C.* to have been indicted," were held equivalent to an averment that he had been indicted; for if he had not, the Defendant could not have known that he had been. And this furnishes another reason for supporting the last count; for a man cannot *advisedly* incite a soldier to mutiny, unless he knows him to be a soldier. So in a late case of *Rex v. Tilly, O.B.S. June 1796, (a)* where the indictment charged that the prisoner was aiding and assisting to one *Idswell* in an attempt to make his escape; that was held on a reference to the Judges, a sufficient averment of *Idswell's* having attempted to escape. In indictments for seducing artificers it is never usual to aver that the Defendant knew the person se-

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(a) *Vid. Sessions Papers*, p. 720.

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duced to be an artificer. *The King v. Myddleton*, 6 T.R. 739. With respect to the 3d objection, I shall not argue that each of the four offences said to be created by the act would not be a felony. But suppose that the prisoner had endeavoured to incite *Matthew Lowe* to all the acts mentioned in the statute, and that such endeavour had been at one and the same time; in that case, as far as the prisoner was concerned, his act would have been single, for the subsequent conduct of the person incited is a distinct consideration. The prisoner is not charged as an accessory to any thing already committed, but only with an endeavour to incite to the commission of some future offence. If the endeavour was but one act, (and it must be so taken now,) the indictment is right, for it cannot charge the offence more accurately than it took place. If the act was general it cannot be made particular by the indictment. It is no objection, after verdict, that an indictment contains several felonies, if each is distinctly charged. *Young v. the King*, in error, 3 T.R. 98. Though the offences in that case were charged in different counts, yet the doing so is only matter of convenience. But in truth this was but one endeavour, constituting but one act.

The 1st objection only remains to be considered. If it were necessary in cases of this sort to state the various means employed, it would be impossible so to frame an indictment as to make it tally with the evidence. The case in *Str. 1127.* is the only one decided on 33 H. 8. c. 1. and on that was founded the decision in the *King v. Mason*, 2 T.R. 581. No one of the four cases referred to in *Strange* was on that statute, and therefore they are not in point: and the indictment in the principal case, as far as we can collect from the report in *Strange*, could not have been good, as it seems to have omitted a material word. The preamble of 33 H. 8. which is referred to in the enacting clause, mentions "privy tokens;" now an indictment, which is more comprehensive than the meaning of a statute, even though it pursues the words of it, is bad (*a*). The same principle goes in answer to the *King v. Mason*; for all false pretences are not within 33 Geo. 2. c. 24. as appears by the opinion of Lord Kenyon in *Young v. the King*, in error. But there can be no supposeable case of an endeavour to incite a soldier to mutiny, &c. which is not within 37 Geo. 3. As to *Davy v. Baker*, the declaration stated "gift or reward," whereas it should have averred which of the two it was. What is within the mean-

(a) *Hawk. P.C. lib. 2. c. 25. f. 111.*

ing of “*legitimo modo electus*,” *Hawk. lib. 2. c. 25. f. 57.* is a question of law, and the manner of election ought to be shewn since no forfeiture can arise but on a lawful election.

The words “mutiny,” and “mutinous and traitorous practices,” used in the 37 Geo. 3. are taken from 22 Geo. 2. c. 33. relating to the navy, and from the annual mutiny act, and the articles of war in pursuance thereof, which make those offences punishable with death in soldiers and sailors. The Legislature here studiously selected the word “endeavour,” as being of the largest and most general import. It mentions no particular modes of attempt, and no circumstances accompanying the attempt, as necessary to constitute the crime. Nor is the body of the act to be restrained by the preamble, as it has no reference to it; but is rather to be extended to all cases within the mischief. The *King v. Robinson*, O.B.S. June 1796 (a). To determine the offence laid in this indictment by the word “endeavour,” not to be the offence mentioned in the statute, would be to alter, not to construe the statute. Certainly, “endeavour” does imply an act done; it holds a middle place between compassing and actual perpetration; it is an attempt to carry the operations of the mind into effect. There are many instances of indictments as large as the present. In conspiracy, which is an offence known to the law *eo nomine*, it is not necessary to state the means employed. *Rex v. Stirling*, 1 Lev. 125. *Rex v. Kinnerley* and another, 1 Str. 193. This was again decided in *Rex v. Eccles*, M. 24 G. 3. where Willes J. referred to the case in *Strange*. In cases of subornation of perjury, though most of the old precedents state a promise of money, *Tremaine's P. C.* from 158. to 174. yet most of the modern ones only state the endeavour to suborn. *Cr. Circ. Comp.* 586. 588. *Cr. Circ. Aff.* 329. So in averring the offence of aiding prisoners to escape, it is sufficient to say, “aiding and abetting.” *Rex v. Tilly*. The form of charging an accessory before the fact is, “that he did incite, move, procure, aid, and abet.” *Cr. Circ. Comp.* 124. Lord Sancier's case, 9 Co. 116. Indictments for seducing artificers, merely pursue the words of the statute (b). *The King v. Myddleton*, 6 T.R. 739. So in maintenance under 32 H. 8. c. 9. Sav. 41. Co. Ent. 163. b. *Rex v. Price*, *Tremaine's P. C.* 177. In forgery with intent to defraud, the fraud may be effected in various ways; yet in *Rex v. Powell*, 2 Bl. 787. *Leach*, 72. it was held sufficient to aver a general intent to defraud.

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(a) *Vid. Siffons Papers*, 722.

(b) 23 Geo. 3. c. 13.

At

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At the *Old Bailey* Sessions in the December following, Perryn Baron delivered the unanimous opinion of the Judges as follows:

In this case three objections were taken in arrest of judgment.

1st, That the indictment does not state in what manner, and by what means the prisoner did *endeavour* to seduce, to entice, and to stir up *Matthew Lowe* from his duty and allegiance.

The 2d objection was, that it should have been averred in the indictment that the prisoner *knew* that *Matthew Lowe* was a soldier.

The 3d objection was, that the second count of the indictment comprehended two distinct offences, *viz.* an endeavour to seduce, entice, and stir up, to commit mutiny, and an endeavour to seduce, entice, and stir up to commit traitorous and mutinous practices.

The 1st objection, namely, that the indictment does not shew in what manner and by what means the prisoner did endeavour to seduce, to entice, and stir up, was supported by a supposed analogy to the rule, and the form of indictments in the case of false tokens and false pretences: and it was argued, that the statute upon which the present indictment is founded supposes a manner and means of endeavouring, by publishing papers and by malicious and advised speaking: and therefore that the means used should have been set forth.

The answer to this objection is, that an endeavour to seduce, to entice, and to stir up, though a conclusion from an infinite variety of facts and circumstances is but a conclusion of fact, is itself a fact, admitting of no definition or description; that the fact is fully expressed by the mere force of the word "endeavour," and can only be expressed by that word, like the words, "conspire, maintain, aid, and abet," which in indictments for the offences of conspiracy, maintenance, &c. do sufficiently express the offences charged in the indictment, without circumlocution, and without shewing in what manner and by what means the conspiracy, maintenance, aiding, and abetting, &c. were produced. We are therefore of opinion that this objection is not sufficient whereupon to arrest this judgment.

The 2d objection was, that it should have been averred in this indictment that the prisoner *knew* that *Matthew Lowe* was a soldier.

The argument urged in support of this objection, that the prisoner could not be guilty of the offence charged unless he *knew* that the man upon whom he practised was a soldier, suggests one answer to this objection, *viz.* that knowledge is necessarily included

included in the charge of endeavouring to seduce, &c. Another full and satisfactory answer is, that the word "advisedly" is in the indictment, which is at least equivalent to the word *scienter*. This objection therefore cannot hold.

The 3d objection is, that the second count of this indictment comprehends two distinct offences.

Probably it will be found to be a sufficient answer to this objection, that (though this charge might have been branched into separate offences) the whole may be but the parts of one fact of endeavour; which must be stated as it is. But in the circumstances in which this prisoner now stands convicted upon the first count of this indictment, to which no sufficient objection has been taken, and upon which therefore judgment must be pronounced against him, it is not absolutely necessary that the Judges should decide upon this last objection, and therefore I forbear to enter further into the consideration of it.

Upon the whole, we are of opinion that there is no ground to arrest the judgment, and that sentence should pass upon the prisoner.

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THE indictment stated that the Defendants after the 1st day of October 1784, to wit, on, &c. with force and arms, at the liberty of *Havering Alte Bower* in the county of *Essex*, in and upon *Charles Wakely*, then and there being an officer of our lord the King, in the service of the excise of our said lord the King duly constituted and appointed, and then and there being *on shore in the due execution of his office and duty*, as such officer as aforesaid, in seizing and securing to and for the use of our said lord the King, a large quantity, to wit, 500 pounds weight of soap, which said soap was then and there liable to be seized by the said *Charles Wakely* as such officer as aforesaid; and then and there being in the peace of God, and of our said lord the King, unlawfully and violently did make an assault, and him the said *Charles Wakely*, so being then and there *on shore in the due execution of his said office and duty* in manner aforesaid, unlawfully and forcibly did hinder, oppose, and obstruct, to wit, at, &c. and other wrongs, &c. *contra formam*, &c.

An excise officer
seizing soap in
the execution of
his office at any
distance from the
sea, is within the
protection of
24 Geo. 3. Sess. 2.
c. 47. s. 15.

2d Count.

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2d Count. For assaulting the said *Charles Wakely*, and for opposing and obstructing him in the execution of his office generally.

3d Count. The same as the 2d, omitting the assault.

This came on to be tried at the *Old Bailey Sessions* in September 1797, before the Lord Chief Baron and *Athurst J.* when the Defendants were found guilty on the following facts:

Two of the Defendants, *Kierman* and *Rooke*, had taken a quantity of soap out of a copper in the manufactory of an entered soap-boiler near *Rumford* in *Essex*, without the presence of an excise officer, and were carrying it away in a cart, in order to conceal it, when *Wakely* an excise officer attempted to seize it; on which he was assaulted by the Defendants *Brady*, *Kierman*, and *Rooke*. *Wakely* had no warrant.

Several points having been reserved at the trial for the opinion of the twelve Judges, at the instance of *Brady's* counsel, they were this day argued (*absente Buller J.*) in the *Exchequer Chamber*.

Runnington Serjt. for the Defendant *Brady*. This indictment is framed on 24 Geo. 3. *Seff. 2. c. 47. s. 15.* the preamble (a) of which shews that it was made to prevent smuggling. The 1st objection therefore is, that the offence charged in this indictment, being within the excise laws, does not come within either the letter or the spirit of an act to prevent smuggling. The customs and the excise have each their own system of positive law, within the letter of which a Defendant must be proved to have offended. Besides, nothing is said in the indictment with respect to the distance (b) from the sea, at which the offence was committed: "being on shore" are the words employed in all the counts. It is true that this is an offence indictable at common law; but as the prosecutor has proceeded on 24 Geo. 3. *Seff. 2. c. 47.* and the trial

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(a) The preamble runs thus, "Whereas the laws heretofore made and now in force to prevent the clandestine importation and running of prohibited goods, and goods liable to the payment of duties into this kingdom, have not been sufficient to answer the good purposes thereby intended, that pernicious practice having of late been greatly increased and carried on by large armed vessels at sea, and by numerous gangs of smugglers upon land, with great violence, in defiance of those laws, to the great loss and prejudice of the public revenue, the detriment of the fair trader, and the endangering the lives of the officers of the revenue acting in the due execution of their duty," &c.

(b) By s. 15. "If any officer or officers of His Majesty's navy, or in the service of the customs or excise, being on shore or going on board, or being on board, or returning from on board any ship, boat, or vessel within the limits of any of the ports of this kingdom, or within four leagues from the coasts thereof, shall be hindered opposed, obstructed, or assaulted, in the due execution of his or their office or duty by any person or persons whatsoever, either in the day-time or night," all persons so hindering, &c. being convicted on indictment shall be sentenced to hard labour or imprisonment not exceeding three years.

has

has been had out of the county where the offence was committed under *s. 17.* no advantage can be taken of that circumstance. 2dly, Supposing this offence to be within 24 Geo. 3. *Seff. 2. c. 47.* yet *s. 15.* of that statute is virtually repealed as far as relates to the commodity in question, by *c. 48. s. 10.* of the same year, which imposes a penalty of 50*l.* on all persons obstructing an officer of excise in the execution of the powers given to him for securing the duties upon soap. That an act may be virtually repealed appears from *Rex v. Cater*, 4 *Burr.* 2026. and *Rex v. Davis, Leach*, 1 *Ed.* 252. [Heath J. There the statutes by which the former were held to be repealed, were passed in subsequent sessions; where both statutes are passed in the same session, the latter is only explanatory.] (a). 3dly, By 23 Geo. 2. *c. 21. s. 34.* and 5 G. 3. *c. 43. s. 20.* excise officers are directed to procure a warrant previous to their entering *any place whatsoever* for the purpose of seizing soap hid or concealed. *Wakely* therefore should have had a warrant in this case, and not having been clothed with the authority required, he was not obstructed "in the due execution" of his duty.

Lord KENYON Ch.J. EYRE Ch.J. and MACDONALD Ch.B. expressed themselves very clearly of opinion, that this last point could not be supported.

Knowls for the prosecution. Smuggling is any attempt to defraud the revenue of any duties; and smugglers by land as well as by sea, were within the contemplation of 24 G. 3. *Seff. 2. c. 47.* The words used in *s. 15.* of that act are "officers of the customs or excise, &c. in the due execution of their duty," &c. This includes the whole range of that duty which belonged to excise officers before the passing of the act; and 10 Ann. *c. 19. s. 19.* having empowered officers to seize soap, this duty was then known to the Legislature. These laws were all made *in pari materia* for the benefit of the revenue. The words "on shore," used in *s. 15.* of 24 G. 3. *Seff. 2. c. 47.* are equivalent to "on land;" and so it was held by *Wilson* J. in the case of the *King v. England, O.B.S. 1788.* (only four years after the passing of the act;) on this objection being taken, who said, the words "on shore" were only inserted in contradistinction to "on board a ship," and to provide against the officers being obstructed in either situation. The above decision has often been cited and never hitherto called in question.

(a) *Vide 2 Wilf. 146.*

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At the *Old Bailey* Sessions in the December following, *Grofe J.* delivered the unanimous opinion of the Judges:

That the words "on shore," used in the 24 G. 3. *Sess. 2. c. 47. s. 15.* mean *on land*, and that an officer of excise seizing soap in the execution of his office at an inland place, at any distance from the sea, is within the scope and protection of that act.

Mr. Justice *Buller* was absent from the 10th of November to the end of the term, from indisposition.

THE END OF MICHAELMAS TERM.

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Hilary Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

JONES v. CLAY.

Jan. 29th.

2 B&F. & P. 137.

LE BLANC Serjt. having on a former day moved for a rule to shew cause why the Plaintiff, who had proceeded against the Defendant by action and indictment for the same assault, should not be directed to make his election to pursue either the one or the other, the Court refused the rule, saying, the Defendant might apply to the Attorney General for a *nolle prosequi*, if there was any thing vexatious in the proceeding by indictment.

If a party proceeded against a Defendant by action and indictment for the same assault, the Court will not compel him to make his election.

Le Blanc now stated, that the Attorney General having been applied to for the above purpose, had informed the Defendant's agents, that since he had been in office, it had been a rule with him never to grant *nolle prosequi* in such cases. (a)

The Court doubted if such an application had ever been allowed, saying, that the fine to the King and the damages to the party were perfectly distinct in their nature, and that if they did what was desired of them in this instance, they must lay it down as a general rule, that parties must always make their election. [192]

Le Blanc took nothing by his motion.

(a) Vid. tam. *Rex v. Fielding Esq.* considered by the Court of K.B. as the 2 Barr. 719. where it appears to have been usual course.

GALTON

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Jan. 31st.

GALTON Demandant v. HARVEY Tenant.

The Court will not permit the wife joined in a writ of right to be tried by a jury instead of the grand assize, though both parties desire it.

Cockell Serjt. having obtained a rule to shew cause why the wife joined in a writ of right between these parties should not be tried by a jury of the county of *Dorset* instead of the grand assize;

Williams Serjt. for the tenant consented; but stated that the attorney for the defendant had promised to make certain admissions at the trial in case the tenant would consent, and desired that the rule might be made absolute on those terms.

Eyre Ch. J. When this was first moved the Court felt an objection which I have not yet got over. You desire to alter the proceedings in a writ of right by consent. That form of action I hold to be *strictissimi juris* at the present day: and I do not feel any inclination to give assistance to a course of proceeding which goes to disturb a possession of 50 or 60 years. If you will have a writ of right you must follow the course marked out by the law. This is the inclination of my mind at present, though I do not mean to say that if my Brothers should think it right to grant the rule that I shall oppose it. (a)

Buller J. expressed himself of the same opinion, and seemed to think that other inconveniences might arise if the rule were granted, from the want of process to compel the witnesses to attend, and of power to prosecute them in case of perjury committed.

Rooke J. of the same opinion. (b)

Rule discharged.

(a) See *Luke v. Harris*, 2 Bl. 1293.

(b) *Vid.* the marginal note to the case of *Crow v. Edwards*, Hob. 5. where it is said the Demandants and Tenants consent that two of the Knights in a writ of right shall be Esquires, although by law they ought to be Knights; yet is it good

though against the law being by consent of

the parties: Also *Bro. Ab. tit. Trialles* 143. pl. 10. H. 4. 5. But the consent must appear upon the record. *Viscount Clare v. Lincb*, Sir T Raym. 372. *Doverew* and another v. *Walcott*, 2 Jo. 199.

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6 East, 297.

4 Ves. Jun. 635.

7 Ves. Jun. 583.

10 Ves. Jun.

248.

Devise in fee to a feme covert, with a power to dispose of the estate without

the control of her husband; held that such a power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine.

GOODILL v. BRIGHAM.

Replevin for taking cattle.

R Cognizance as bailiff of *C. Rogers* "because he says that one *John Poad* long before the said time when, &c. to wit on

&c.

ſt. was feised in his demeſne as of fee of and in the ſaid farm and tenement with the appurtenances in which &c. And being ſo thereof feized he the ſaid *John Poad* long before the ſaid time when &c. to wit on &c. at &c. in due form of law made his laſt will and teſtament in writing, and thereby gave and deuiled unto his ſiſter *Elſher Rogers* her heirs and affiſns for ever the ſaid farm and tenement in which &c. with the appurtenances. And the ſaid *John Poad* by his ſaid will declared that his will further was that what eftate and effects he had thereby given to his laſt ſiſter ſhould be fully veſted in her notwithstanding her coverture, and that ſhe might give ſell and diſpoſe of the fame as ſhe ſhould think proper, and alſo give acquittances and other diſcharges ſo as not to be under the controul of her own huſband the ſaid *C. Rogers*, which ſaid huſband ſhould not intercede or meddle with any of the eftate or effects thereby given to his ſaid ſiſter. And the ſaid *John Poad* afterwards and before the ſaid time when &c. to wit on &c. at &c. died ſo feized of his ſaid eftate of and in the ſaid farm and tenement in which &c. with the appurtenances, after whose death to wit on &c. the ſaid *C. Rogers* and *Elſher* his wife by virtue of the ſaid will entered into the ſaid farm and tenement in which &c. with the appurtenances, and became feized thereof in their demeſne as of fee in right of the ſaid *Elſher*, and being ſo feized &c." It then flated, "that *C. Rogers* and *Elſher* his wife by *leafe and release* conveyed the premises to *P. Merry* in fee to the intent and purpoſe that *C. Rogers* might receive an annuity or rent-charge of 40l. for his life payable half-yearly with power of diſtreſs; that *P. Merry* by virtue thereof became feized of the premises in fee ſubject to the above annuity, and the ſaid *C. Rogers* became feized in his demeſne as of freehold for life of the ſaid annuity; that 140l. for ſeven half-yearly payments were in arrear. Wherefore &c."

Plea in bar that *Elſher Rogers* died before the firſt half-yearly payment of the annuity became due.

To this there was a general demurrer and joinder.

Shepherd Serjt. for the Avowant. The queſtion is, Whether *Elſher Rogers* could convey the premises in diſpute without levying a fine, the eftate by the words of the will having been given to her in fee, with a power to diſpoſe of it without the controul of her huſband? The diſtinction taken in the books is this: If a power be given to a married woman, and an eftate be alſo given to her

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by the same will, yet if the power does not flow from the estate she may convey without fine; though if the power arise from the mere possession of the estate it is otherwise. In *Co. Lit.* 112, it is said "If *cestuy que use* had devised that his wife should sell land, and made her executrix and died, and she took another husband, she might sell the land to her husband, for she did it *auter droit*, and her husband should be in by the devisor." It is true that the power there was to sell, but the power in this case being specifically given by the will is as distinct as if given for the purpose of sale; and *Ester Rogers* must be considered in the same light as any other person executing a power. 1 *Roll. Abr.* p. 329, pl. 10. *Bro. Abr.* tit. *Cui in Vitâ*, pl. 15. The disability of feme covert to convey by deed is the same as to dispose by will now in *Gibbons v. Moulton*, Rep. temp. Sir H. Finch 346. the Court held a power to will given to a feme covert to be distinct from an estate given to her by the same instrument. In *Daniel Ubley*, Sir W. Jones 137. *Latch.* 9. 39. 134. *Ubley* devised his house "to *Agnes* his wife to dispose of at her will and pleasure, and to give to such of his sons as she should think best:" *Agnes* having married again, and enfeoffed *William* the second son in fee, and made livery, the conveyance was held good: nor does it make any difference that a number of persons were pointed out in the case from whom the feme covert was to select one, and that in the present case *Ester Rogers* might select whom she pleased. Wherever the power of appointment is distinct from the estate a feme covert may be considered as a feme sole. *Grigby v. Cos* 1 *Vez.* 517. 1 *Bro. Chan. Caf.* 20. *Dighton v. Tomlinson*, Com 194. The testator in this case has given a power to *E. Roger* which he never could have derived from the mere possession of the estate. A power to a feme covert to make leases without her husband, or to convey a reversion after her own estate for life is good, because it gives a right to do that which she could not do without it. *Bayley v. Warburton*, Com. 494. *Powell on Powers* 34. *Doe v. Strachan*. So here an estate having been devised to a woman already married, who had no right to convey without her husband unless by virtue of the power specifically given; she does in consequence of that power acquire a right to do something which by operation of law she would not have had. It is manifest that the testator intended to give an estate to *E. Rogers* free from the controul of her husband; but if the Court decide against this power she will not have an estate free from the controul of her husband.

husband, for if a fine be necessary he must join in it, and in case of a child born he would be tenant by the curtesy. In order to give effect to the testator's intent, the Court may construe this devise to be to such uses as the wife shall appoint, and until that appointment to herself and her heirs, or an estate to her for life, remainder to such uses as she shall appoint, remainder over to her heirs; in either of which cases she would take a fee-simple conditional, and might therefore convey without fine. *Co. Lit.* 216. and *n.* 119. *ed.* 15.

Le Blanc Serjt. contrà. 1st, As to the intention of the devisor, it is manifest that he wished to relieve *E. Rogers* from the controul of her husband. Now the instrument in question was made for the benefit of the husband and immediately under his controul, being to secure an annuity to him for life. 2dly, The word "power" in law may be thus defined, *viz.* an authority given to one person to be exercised over the estate of another; but there is no case where an authority to be exercised over the estate of the donee has been construed to be a power. The party taking the estate under the power has always been held to be in by the conveyance of the donor. In the case put *Co. Litt.* 112. *1 Bell. Abr.* p. 329. pl. 10. the wife would have a mere naked authority without any interest in the estate over which the power is to be exercised. It is true that though a certain interest be given to the wife, yet she may execute a power collateral to the interest, as in the case of a life-estate given to a feme covert, with power to dispose of it by will; the power there being collateral to the interest, since it extends to a part of the estate to which the interest does not. Thus in *Gibbons v. Moulton*, an annuity was given for the life of *A. B.* which might last longer than the life of the devisee, and therefore the devisee was enabled to dispose of the remainder. In *Daniel v. Ubley* it was the opinion of *Jones*, that the wife took an estate for life, with power to convey the remainder to such of the sons of the devisor as she pleased, or that she took a fee-simple conditional, in which last case as well as in the first the conveyance was good. *Bro. Abr.* tit. *Cui in vita*, pl. 15. With respect to *Dighton v. Tomlinson*, the wife there had only an estate for life, with a power over that part of the estate which was not disposed of. The cases in Chancery are not of authority here, since that Court cures any difficulty arising from legal disabilities. This is like the attempt in *Habergham v. Vincent*, 5 *Term Rep.* 92. to execute a devise of lands under a power without three attesting witnesses, or like a

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devise of lands in tail with a restriction on the devisee from suffering a recovery. The deviser in this case has given to the wife as great an estate as possible, and superadded a power to dispose of it in a way which the law does not allow.

EYRE, Ch. J. It struck me on reading this case, that it would be very difficult to sustain the conveyance in question: and when it was admitted in argument that this was a devise in fee-simple with a power superadded I did not comprehend how that could be. My brother *Le Blanc* has argued the case very luminously and satisfactorily, and so as to convince me that a power is inconsistent with such an estate. If we trace back the nature of uses, it will be clear that this cannot be considered as a power. Powers are the modifications of the uses of that estate, which a man has to dispose of; and great latitude is allowed in making those modifications. If a man employ the proper means, he may create all kinds of powers that are consistent with, and within the extent of his fee-simple; and until his fee-simple is exhausted, I know of no power, no distribution, (provided it do not violate the rules of law,) which could not be supported: as far as that goes the doctrine of powers is very intelligible. The power which any one creates must be exercised over his own estate; but when it has been exercised over that estate to the extent of that estate, that is, when he has given away the whole fee-simple, and the whole use of the fee-simple too, it seems to me that he is *functus officio*. What remains for him to do? All which he does beyond that goes to say in what manner the fee-simple shall be enjoyed by the donee, and is matter of direction intended by the donor to controul all the rules of law. When a deviser gives an estate to a feme covert and attempts to relieve her from the disability arising from her coverture, his estate being exhausted, the law must controul her enjoyment of it. It is true that he may modify her enjoyment of the estate, as far as is within the use of the estate, as if he make a conveyance in fee to trustees, and direct that the wife shall have the estate to her sole and separate use, and make a subsequent declaration to such uses as she shall appoint, the uses will wait upon that declaration, and as soon as any step has been taken to execute the power, the uses will receive that direction from the appointment which he intended that they should receive. In that case the appointment under the power will enure as a limitation of those uses which he had a right to limit. But the present case seems quite beyond the scope of a power, and of all the rules of law which have

have prevailed with respect to the execution of powers. The devisor has given a fee-simple to the wife to be enjoyed by her to her sole and separate use: what does the law say? The law says that a feme covert cannot take an estate to her sole and separate use. The devisor should have taken the necessary steps to carry his intent into effect: he should either have devised the estate to trustees with the uses waiting on what he might authorize her to do, or he should not have given her the whole fee: in either of which cases this power might have been well executed. This appears to be the state of the case on principle; and on authority there is nothing which goes to establish that where there is a direct conveyance of an estate in fee-simple any use can be grafted upon it; much less a use of this nature, the object of which is to enable a feme covert to do what by law she is disabled from doing. All powers which can be given, must be part of the use of the fee-simple, and the moment that use is exhausted, there can be no such thing as annexing some new use, beyond all which the party himself had to give. I think therefore that the case is with the plaintiff.

BULLER, J. If by transposing the clauses of the will the Court can give effect to the whole will, they may do so, but they must be careful not to thwart the intention of the devisor, by giving a different interest from what he intended. If by transposing the clauses they could come to the conclusion that an estate for life only vested in the feme covert, they might hold the power of appointment good; for in that case, this would be a devise of an estate for life to *E. Rogers* with a power to dispose of the remaining interest being in another person. My brother *Le Blanc's* definition of a power is certainly correct. It is an authority enabling one person to dispose of the interest which is vested in another. Let us see then if it be possible consistently with the intention of the devisor to confine the interest of *E. Rogers* to an estate for life. Nothing can be more positive than the expressions of the will which describe the interest which *E. Rogers* is to take. The words are "to *E. Rogers* her heirs and assigns for ever," and not content with this the devisor adds, "that what estate and effects he had given to his sister should be fully vested in her notwithstanding her coverture," &c. This devise is as explicit as possible, and creates in her a complete fee-simple. Then the power given is inconsistent with the estate, and we cannot reduce the latter to an estate for life, for we cannot vary the interest which

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the devisor has given. Suppose by transposing the clauses we could construe this to be a devise to such persons and uses as *E. Rogers* should appoint; and for want of such appointment to her and her heirs. If the devise had stood thus, she could have taken nothing till her death, or till her appointment. Now the devisor clearly intended that she should take immediately: we cannot therefore make this construction without doing actual violence to the will. The devisor seems to have had two intentions which are inconsistent; one was, to give an estate in fee to *E. Rogers*; the other, to qualify it in such a manner as that her husband should have no power over it; which last is contrary to the rules of law: the Court will therefore carry into effect the first intention, and reject the other. How does this case differ from an attempt to create a power of disposing by will attested by one witness, or to devise an estate tail with a restriction on the devisee from suffering a recovery? In this as well as in the cases I have put, we can only say, the law will not allow of such a disposition.

ROOKE, J. A point has arisen from the circumstances of this case which has never before been determined in a court of law; from which I infer, that such an attempt has never before been made, or if made, has been deemed insupportable. The law says, that a married woman shall not alienate without fine. If a man would give a fee-simple to a feme covert, with a power to alienate without fine, he must do it by means of trustees. That has not been done in this case. When a man gives a fee-simple, he shall not be allowed to say, that such fee-simple shall not be subject to all the restraints which the law imposes upon it. The devisor having given a fee-simple, he could add nothing to it, and consequently the subsequent power is void. It has been said, that possibly by our decision we shall defeat the intention of the devisor; but if that intention be contrary to law, it does in fact defeat itself. It seems to have been his intention, that the object of his bounty should not act under the controul of her husband. On the facts of this case, however, it appears that she has acted under his controul, having conveyed an estate to her husband jointly with him, and without the intervention of any legal authority.

Judgment for the Plaintiff.

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BULL v. TILT.

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ASSUMPSIT for wages.

Pleas. 1st, *Non-affumpst.* 2dly, That the Plaintiff, before the time of the action commenced, was convicted of felony, and sentence of transportation passed upon him.

A pardon if pleaded must be averred to be under the great seal.

Replication joining issue on the 1st plea. As to the 2d plea, "that after the said conviction of the Plaintiff, and after the giving of the said judgment in the said plea mentioned to have been given against him as aforesaid, and before the suing forth of the original writ of the Plaintiff in this behalf, (to wit,) on, &c. at, &c. our sovereign lord the now king, in consideration of the opinion of the judges of our said lord the king in the Plaintiff's behalf, was graciously pleased to extend his gracious mercy unto the Plaintiff, and did then and there grant the Plaintiff his said Majesty's *free pardon* for the said crime, of which the said Plaintiff was so convicted, as in the said plea is mentioned. And this, &c. Wherefore, &c."

To this there was a special demurrer, "for that the said Plaintiff hath not in or by his said replication alleged or shewn in what manner the supposed pardon therein mentioned was granted, or that the same was under the great seal of *Great Britain*; and also for that the said Plaintiff hath not in or by his said replication set forth or shewn the letters patent, if any, by which the said pardon was granted, or brought the same into court here; and also for that the said replication is, in other respects, uncertain, insufficient, and informal."

Joinder in demurrer.

Kirby Serjt. being called upon by the Court to support the replication, contended, that although the case of the *King v. Beaton*, 1 Bl. 479. was an authority to shew that a pardon is not good unless under the great seal, yet that it did not prove the necessity of averring that circumstance; but on the contrary, that it must be implied from the Plaintiff's averment of his having received a *free pardon*, that it was under the great seal, since no other pardon is good. (a)

EYRE Ch. J. I take it that every thing under the great seal must be pleaded *sub pede sigilli*, and that a pardon must be under the great seal is clear. However, that this may not be taken too

(a) *The King v. Maximilian Miller*, 2 Bl. 797.

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generally, I think it right to mention that under some statutes the king's sign manual actually carried into execution, and the conditions performed, may amount to a statute pardon. But those are exceptions not at all affecting this case.

Per Curiam, Judgment for the Defendant.
Palmer Serjt. for the Defendant.

Feb. 3d.

1 Taur. 485.

Defendant before the action commenced quitted the kingdom, leaving another in possession of his house and goods; Plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance; and held regular.

Sir W. STAINES Knt. and another, Sheriff of Middlesex, v. JOHANNOT.

THE Defendant previous to the commencement of this action, which was on a bail-bond, quitted this country and resided with his family in *Dublin*, having left his mother in possession of the cottage and furniture which he formerly occupied. A summons to appear having been served at the cottage, and no appearance entered, a *distressing* issued, under which forty shillings were levied on the effects in the mother's possession.

Shepherd Serjt. on her part now moved for a rule *nisi* to stay the proceedings, and that the levy should be restored with costs: and cited *Webster v. M'Namara*, *Trin.* 32 Geo. 2. *Imp. Pract.* C. B. 619. 4th ed.; where a similar application by the wife of a person out of the kingdom was allowed.

The Court were of opinion, that as the Defendant had goods within the bailiwick by which he might be distrained, the proceeding was regular: but that at any rate the mother, who had no interest in the goods taken, could have no right to make this application. And *Eyre Ch. J.* added, that the case of *Webster v. Macnamara*, if law, differed from this, as the application there was not made by the wife on her own account, but on the part of her husband.

Shepherd took nothing by his motion.

Feb. 6th.

Pof. 313.
1 New Rep. 184.
1 Taur. 452.

Insurance on a voyage from C. to D. on a representation that the

DRISCOL v. PASSMORE.

A ssumpsit on a policy of insurance, with a count for money had and received. The Defendant paid five guineas into Court.

Ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C., being unavoidably prevented, the ship returned to A., from thence proceeded immediately to C. and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured.

The

The ship *Timandra* being about to sail on a voyage from *Lisbon* to *Madeira*, from *Madeira* to *Saffi* on the coast of *Africa* in ballast, and from thence back to *Lisbon*, with a cargo of wheat; the Plaintiff directed his broker to make three insurances, *viz.* one on three-fourths of the ship for the round voyage, one on three-fourths of the freight on the voyage from *Lisbon* to *Madeira*, and one (which was the insurance in question) on three-fourths of the freight from *Saffi* to *Lisbon*.—The two former were effected without any difficulty, but the broker was not able to get the third underwritten at the same time, on account of the distant period at which the risk was to commence: however, on a representation some time afterwards, that he had received intelligence of the ship's arrival at *Madeira*, and that she was about to proceed on her voyage immediately, this also was effected. When the *Timandra* arrived at *Madeira*, all the crew except two, being alarmed by reports of some *Moorish* cruisers being off *Saffi*, and of their having captured and ill-treated a *Dane* and an *American*, quitted the ship, and refused to return to it unless the captain would promise to sail immediately for *Lisbon*. Under these circumstances, the captain carried the ship back to *Lisbon*; but on his arrival there, the charterers insisted on his proceeding directly from thence to *Saffi*; which he accordingly did, and was captured in his return from *Saffi* to *Lisbon*. It was in evidence that the difference of season arising from this delay did not vary the risk.

This was tried before *Eyre Ch. J.* at the Guildhall sittings after *Trinity Term*, when a verdict was found for the Plaintiff.

A rule having been obtained in *Michaelmas Term*, calling on the Plaintiff to shew cause why the above verdict should not be set aside, and a new trial be had, on the ground of the voyage insured never having commenced,

Shepherd Serjt. shewed cause. I contend, 1st, That the voyage in which the ship was captured, was the voyage insured; since the previous voyage from *Lisbon* to *Madeira*, and from thence to *Saffi*, never having been abandoned, was virtually though not in fact performed. The *Timandra* sailed from *Lisbon* to *Madeira* with a cargo, and from *Madeira* to *Saffi* by way of *Lisbon* in ballast. If she had taken in a new cargo at *Lisbon*, and had sailed on a different object from that originally in view, it might have been considered as an abandonment. Here there was not only a probable cause for the ship's return to *Lisbon*, but the captain was under the necessity of returning for the benefit of his owners. Deviation to avoid

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avoid perils is justifiable, and the new course therefore which was taken may be considered as a continuance of the original voyage, since it is not necessary to return to the point from which a deviation commenced (*a*). Doubts occurred at the trial whether the captain had not returned to *Lisbon* without probable cause, and therefore abandoned the voyage; and whether, as the voyage from *Lisbon* to *Saffi* was performed at the instance of the charterers, the captain's intention to abandon the original voyage was not thereby proved: but both those questions have now been determined by the jury. 2dly, This was merely an insurance on a voyage from *Saffi* to *Lisbon*, which has been literally performed: and it was not necessary to perform the preceding voyages from *Lisbon* to *Madeira*, and from thence to *Saffi*, in order to make that good. I do not contend that this was an indefinite insurance on any voyage from *Saffi* to *Lisbon*, to be performed at any time: if the risk had been materially altered, (as if the ship had first gone to the *East Indies*, and a *Spanish* war had broken out,) the underwriters would have been released. It may be said perhaps that they speculated on the time when the risk was to commence: but there was no warranty in this case: it was represented that the voyage in question was to be performed after certain other voyages; and the representation was true, for it was originally intended that the *Timandra* should take that course, but by subsequent circumstances she was prevented from so doing. The policy therefore is not void for misrepresentation; nor was the risk of the underwriters at all altered, as the deviation was justified by necessity.

Adair and *Le Blanc* Serjts. in support of the rule. As to the last point made by the Plaintiff's counsel, we contend, that wherever a voyage is insured from *A.* to *B.*, it must be understood either that the ship is at *A.* at the time of the insurance, or it must be stated how and when she is to arrive there: otherwise it will be an indefinite insurance on the first voyage which the ship shall make, from *A.* to *B.* with the same master, and the other requisites of the policy. Now if it be impossible to make an insurance on a voyage from *A.* to *B.*, without stating whether the ship is at *A.* or when she will be there, that circumstance if stated becomes an ingredient of the risk insured; and this seems to have been the understanding of the underwriters in the present case, who refused to insure till they were informed of the ship's arrival at *Madeira*. This was not an insurance on any voyage which the ship might make from *Saffi* to *Lisbon*, but on a voyage from *Saffi* to *Lisbon*, being part of a

(*a*) *Delaney v. Stoddart*, 1 T.R. 22.

voyage

voyage already commenced, from *Lisbon* to *Madeira*, from *Madeira* to *Saffi*, and from thence to *Lisbon*. Nor was it necessary for the underwriters to require a *warranty* that the *Timandra* should go the whole voyage, having a *representation* to that effect: and as the only difference between a *warranty* and a *representation* is, that a mere formal deviation from the one is fatal, and only a substantial one from the other, this policy is clearly void, for the deviation here was substantial. With respect to the first point, the voyage insured was abandoned; or rather as the latter part of the previous voyage was abandoned, the voyage insured never commenced. At *Madeira* the captain was to exercise his judgment whether it was more for the benefit of his owners to relinquish the voyage altogether, or to wait at *Madeira* till he could find the means of proceeding. He did exercise his judgment, and by returning to *Lisbon*, evinced that he thought it better to abandon. The voyage undertaken at the instance of the charterer was a new voyage: no recommencement of what had once been abandoned could make the underwriter liable.

EYRE Ch.J. At the time of the trial, I had considerable doubts on this case: but the discussion of to-day, and the opportunity which I have had of further considering the question, have in a great degree cleared them up. If I had continued to doubt I should be unwilling to interfere with a verdict of a special jury of merchants on a subject of this kind, unless I clearly saw that some principle of law had been mistaken; or unless I was bound by authorities to pronounce that verdict wrong. With respect to authorities there are none, for this is admitted to be a new case: we ought therefore to be fully satisfied, that upon some principle of law the verdict is wrong before we interfere by granting a new trial. It has been argued in support of the rule, that the voyage insured was the third branch of a specific voyage, specifically described in the policy: but I take the voyage insured to be a voyage from *Saffi* to *Lisbon* only. Now that the voyage so described did literally commence there can be no doubt, and I know no way in which that voyage could be restricted in point of commencement or connexion with any other voyage, but by representation or warranty. That point was ably put by my Brother *Shepherd*: If a man be asked to underwrite a voyage from *Saffi* to *Lisbon*, he naturally says, "Let me know what this voyage is, and at what time it is to commence, that I may judge of the risk. Is the ship now at *Saffi*, or where is she?" He will expect a

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representation, and that representation ought to be true : here the representation was, that the ship was bound from *Lisbon* to *Madeira* with a cargo, from *Madeira* to *Saffi* in ballast, and from thence to *Lisbon*. That representation was really true at the time that it was made, and the underwriter was to form his own calculation of the time when the *Timandra* would arrive at *Saffi*. If the insurance was made on a representation which was true at the time, it will be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, will discharge the underwriter. He formed his judgment of the case, knowing that all was executory, and that an alteration might arise of a kind that might increase his risk ; upon the representation made to him he underwrote. The fact is, that the representation being true, a circumstance occurred under which the captain was distressed how to act, and respecting which there might have been different opinions : he resolved to go back to *Lisbon* ; the charterer there called upon him to fulfil his engagements ; he sailed accordingly, and arrived at *Saffi* ; and in the course of his voyage home was captured. Then why have the jury done wrong in saying that the underwriters are liable ? They were literally bound to insure a voyage from *Saffi* to *Lisbon* ; tied up, indeed, as far as a representation of the projected voyage, executory in its nature, could tie it up, and that representation was true at the time that it was made. The voyage from *Saffi* to *Lisbon* might have been performed with as much ease after the circuitous voyage had taken place (unless a *Spanish* war had broken out) as in the direct course originally proposed. On what principle then can the underwriters be discharged ? The voyage has in substance been performed : the ship was diverted from her intended course by circumstances for which no one was to blame, and having arrived at *Saffi*, took in the cargo which was the original object of the insurance.

HEATH J. I am of the same opinion. This is an insurance on a voyage from *Saffi* to *Lisbon*, which being a voyage to commence *in futuro*, it was necessary that the agent of the insurer should give all the intelligence of which he was possessed to the underwriters. Now the captain's orders were to go from *Madeira* to *Saffi*, and from thence to *Lisbon*. Indeed it is not contended that there was any misrepresentation, but only that the voyage insured was never commenced ; though the intention clearly was to have proceeded in the round voyage, had not the crew been alarmed

alarmed by reports of an enemy off the coast of *Saffi*. The question is not whether the captain meant to abandon, since he had it not in his power so to do, without the consent of the charterers; and at their instance he *did* proceed on the voyage as soon as he conveniently could. This is like all other cases of deviation justified by particular circumstances, and I see no reason to quarrel with the verdict.

Rooke J. expressing some doubts with respect to the liability of the underwriters, founded on the circumstance of their having at the time of the insurance apparently taken into consideration the period at which their risk was to commence, since they refused to underwrite the *Timandra* till the broker informed them of her arrival at *Madeira*;

The case stood over till this day, when *Eyre* Ch. J. said, that the Court were now unanimously of opinion, that no new trial ought to be granted.

Potea to the Plaintiff.

PURTON v. HONNOR.

Feb. 6th.

ACTION on the case to recover damages sustained by the Plaintiff in defending a vexatious ejection brought against him by the Defendant, in which the nominal Plaintiff had been nonproffed.

An action on the case to recover damages against the lessor of the Plaintiff in a vexatious ejection is not maintainable.

General demurrer to the declaration: and joinder.

Cockell Serjt. was this day to have argued in support of the declaration:

But the Court expressing themselves clearly of opinion on the authority of *Szville v. Roberts*, 1 *Salk.* 14. that such an action was not maintainable, he declined arguing the point; and the Court gave

Judgment for the Defendant.

DAHL v. JOHNSON.

THE Defendant being held to bail for 25*l.* by a Judge's order, in an action of assault, each of the bail entered into a recognizance for double that sum: the Plaintiff obtained a verdict for

liable to double the sum ordered, as well as to double the sum sworn to in case of affidavit.

105*l.*

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6 *Eas.* 312.
Contra in B. R.
vide 1 Eas's.
Rep. 91. *M.*
40 *G. 3.*

Where bail is taken under a judge's order in this court, each of the bail is

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105*l.* and signed judgment for his damages and costs: accordingly *a.c.a. fa.* issued against the Defendant for 138*l. 5s.* and the bail were fixed.

Cockell Serjt. now shewed cause against a rule *nisi*, for staying all proceedings on their recognizance, upon payment by the bail of the sum of 25*l.* and costs; he contended, that whatever might be the practice of the King's Bench, as laid down in *Jackson v. Hassel, Doug.* 330. each of the bail was liable in the Common Pleas to the full extent of the recognizance, and cited *Calverac et ux. v. De Miranda*, 1 *Barnes* 74. *Mitchell and others v. Gibbons*, 1 *H. Bl.* 76. and *Fowlds v. Mackintosh*, 1 *H. Bl.* 233.

Le Blanc Serjt. in support of the Rule.—In *Calverac v. Miranda*, the bail only justified in the single sum ordered by the Judge, and to that extent each was held liable; the inference from which case is, that the bail are not liable beyond the sum ordered by the Judge. The cases of *Mitchell and others v. Gibbons*, and *Fowlds v. Mackintosh* differ from this: the former having been a proceeding on the bail-bond, where the Defendant not appearing, the Plaintiff had no other remedy, and the latter an attachment against the sheriff, whom the Court refused to relieve without his putting the Plaintiff in the same situation as he would have been in, but for the sheriff's default. In *Calverac v. Miranda*, the bail only justified to the single amount of the Judge's order, and there is no rule of Court altering that practice. Indeed it would be a great hardship on the bail, who have formed their opinion of the sum to which they may be liable from the Judge's order, that they should be held liable to a larger sum.

EYRE Ch. J.—I think that this case cannot be argued on the nature of the contract which the bail may be supposed to have intended to enter into: such an argument would be used in opposition to the whole practice which regulates cases of bail. The bail always enter into a recognizance for double the sum sworn to, and no doubt they will be answerable to the extent of their recognizance for the damages sustained by the Plaintiff. There is an end therefore of that kind of reasoning which supposes that the parties were deceived in the contract into which they entered. I think the only question is, whether there has been such a mistake in this instance as should induce the Court to relieve the bail upon equitable terms? This must depend upon the notion, that when there is a Judge's order the bail are only to be bound in that sum which the order expresses. If there had been any settled practice of that kind I should not have thought

it unreasonable: but on the principles which govern us with respect to bail in general, I can see no difference between an order, and an affidavit to hold to bail. The order is introduced because from the nature of some particular cases it is impossible for the Plaintiff to swear to the precise sum due; instead therefore of ascertaining the sum by affidavit, it is left to the discretion of a Judge to say what it shall be. But when once that sum is ascertained, on what principle is it that the bail should not enter into the same kind of security as in common cases? What is to be done on affidavits, is to be done on a Judge's order; and I know no way of making our practice consistent but by holding it so. It was formerly a rule of the Court, that if the Defendant himself became bound, the bail should only enter into a recognizance for the single sum (*a*). This was a general rule, and extended as well to cases on affidavit, as to those on a Judge's order. Afterwards the Court thought it improper for the Defendant to become bound at all, and made a rule (*b*) accordingly. With that I am well satisfied; if it was right for the Court to make a further regulation that the bail should not be liable to more than the sum sworn to, they should have said so; but I cannot see that there is any distinction between this case and the case of bail taken on affidavit.

BULLER J. As the practice of this Court stands settled, the present case must be decided by it, for the reasons which my Lord has fully and ably laid down. I cannot however but think the practice of the King's Bench more reasonable. The bail there become bound in double the sum, but they are not separately liable to that extent; each may discharge himself on paying the single sum sworn to. A man should know the extent of his liability; if he consent to become bound for 50*l.* why go beyond that sum? if you do, he never can know the extent of his own liability. I do not think our practice good; but that consideration cannot affect this case: it may be matter for the deliberation of the Court, whether we should not alter the practice, retaining it indeed in part, and making each of the bail liable to the sum sworn to, but not in the double sum as is now the case. The bail look to see what the debt is, and it is reasonable that they should infer from thence the extent of their obligation. In the

(*a*) *Vid. Cook's Rules and Orders, C.B. 5 W. & M.*

(*b*) *E.T. 36 G. 3.* It is ordered that from and after the first day of the next term in all actions requiring bail, the De-

fendant shall not be permitted to enter into the recognizance; but the bail shall each of them enter into a recognizance in double the sum sworn to,

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present case, however, they must be held liable to the amount of their recognizance separately, not exceeding the sum recovered.

Rooke J. The dispute on this motion arises from the alteration introduced by the Court, forbidding Defendants to become bound at all. I certainly have acted under a mistake; for when I have fixed the sum for which the Defendant was to be held to bail at 10 or 20 pounds, I have considered the bail as giving security for no more. Formerly it was so, when the Defendant had his option to become bound with the bail: for if the Defendant was bound, the recognizance was only taken for the single sum. But does it follow from our having forbidden the Defendant to become bound, that when he has not his option, the bail should be bound in double the sum? That never was the case under the old practice, except when the Defendant did not choose to become bound.

The Court, with the consent of the parties, made

The rule absolute on payment of the amount of the recognizance by each of the bail with (a) costs.

(a) This application having been first made to the Chief Justice, who referred the parties to the Court, and declarations hav-

ing since that time been delivered, the Court restrained the costs to be paid by the bail to the period of that application.

Feb. 12th.

MORRIS v. WALL.

If any part of the consideration of an annuity be paid in country bank notes, the dates and times of payment must be set out in the memorial under the annuity act.

SHEPHERD Serjt. on a former day obtained a rule calling on the Plaintiff to shew cause why the judgment signed on a warrant of attorney given to secure an annuity of 75*l.* should not be set aside, on the ground of the memorial having stated that part of 600*l.* the consideration-money, was paid "in notes on the Bank of England and country bank notes," without specifying the dates and times of payment of the latter. It now appeared however by the affidavit of the Plaintiff, that at the time of executing the deeds the Defendant had his option of being paid in cash or notes, and accepted the latter as equally convenient to himself.

Clayton Serjt. for the Plaintiff. If it be only necessary to state in the memorial that the consideration was paid in money, the Court may consider this as a payment in money. It is clear that by the word "money" the act (a) did not mean cash only, for s. 4. supposes a case where payment is made in notes. The policy of the act was to prevent goods at an exaggerated price being made the consideration of an annuity. But the question here is, Whether any symbol of money passing current and ac-

(a) 17 Geo. 3. c. 26.

cepted

cepted as money, be not money within the meaning of the act? In *Wright v. Reed*, 3 *Term Rep.* 554. bank notes were so considered. A bank note tendered and not objected to is a good tender in money. So a country bank note payable on demand, if taken as payment, is good payment. To go one step further, if a country bank note be accepted as a tender, but refused because not so much in amount as the party thinks himself entitled to, it may be a good tender *pro tanto*. Much inconvenience would arise from setting out the dates and times of payment of notes in these transactions, since the number employed must often be such as to occasion great prolixity.

Shepherd contra. No agreement between the parties to accept any thing as money can make any difference, since the object of the act is to prevent improvident agreements. The objection here does not arise from the dates and times of payment of the bank notes not being set out, but those of the *country bank* notes, which are not always payable on demand. They are the promissory notes of a banker; and in *Rumball v. Murray* and another, 3 *Term Rep.* 298. and *Berry v. Bentley*, 6 *Term Rep.* 690. it was held that promissory notes and bankers checks must be set out. In this case, if 5*l.* only was paid in bank notes, and the rest in country bank notes payable at a month, 600*l.* will not in fact have been paid.

EYRE Ch. J. If this question was open I should feel no difficulty in deciding it. I should be of opinion that the memorial need not be a memorial of the *transaction*, but of the *deeds*, and that the consideration expressed in the latter, was to be the consideration expressed in the former. If the consideration, which may be in notes, is not *bond fide* paid, then I should think the best and most consistent method of effectuating the intention of the act, would be for the party to take his remedy by application to the Court, on affidavit, to have the deeds set aside. But this question has been decided, and so decided, that I am bound hand and foot. There are two cases on the point, against which I cannot take upon myself to interpose my private judgment, sitting here and exercising a summary jurisdiction. I wish indeed that the question had been put upon the record, in the first instance, that a solemn decision might have been had, and a rule obtained, by which all the courts might be directed in the exercise of this summary jurisdiction. But when I see two determinations, that where the consideration is paid in notes, not of the Bank of England, they must be set forth in order that the Court may see

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whether they are such notes that they can be considered as cash,
I must submit, though I do it with reluctance.

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BULLER J. I am of the same opinion.
ROOKE J. I am of the same opinion.

Rule absolute. (a)

(a) Vid. etiam *Poole v. Cabanes* and others, 8 T.R. 328.

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CALLIAND v. VAUGHAN.

The Court will not by putting off a trial or other indirect means compel a party to consent to a commission for the examination of witnesses in Scotland. Where contradictory verdicts have been found on a policy of insurance and a third action brought against another underwriter, the Court will not put off the trial to enable him to obtain a commission from a Court of Equity for the examination of witnesses in Scotland to the same facts which were given in evidence on the last trials: at least if he has obtained time to plead on the usual terms.

A POLICY having been effected on the life of the late Earl of Glencairn, with a warranty of good health, several actions were brought thereon in the King's Bench, one of which was tried in Easter Term last, when a verdict was found for the Defendant. A second action was afterwards brought in this court against another underwriter, and the evidence of the principal witness for the Defendant being impeached by new evidence on the part of the Plaintiff, he obtained a verdict. In both courts new trials were moved for and refused. The Plaintiff discontinued the remaining actions in the King's Bench, and brought them in this court, of which this was one.

Adair Serjt. on a former day applied to the Court, on the part of the Defendant, to exercise its authority by granting imparlements from time to time, or by such other means as it should think proper, to compel the Plaintiff to consent, that a commission should issue out of this court for the examination of witnesses in Scotland. He produced affidavits stating the importance of their evidence with respect to the state of the Earl of Glencairn's health, and contended that he was entitled to this indulgence as the evidence to be obtained was merely to supply the place of that which had been impeached upon the second trial. He said that the reason why he did not move to put off the trial in the usual way was, that he could not state any probability of the witnesses being able to attend at any future time.

The Court however not being satisfied that it was proper for them to compel a party, by indirect means, to do what they had no authority to compel him to do directly, and adverting to an important question which might arise, Whether any one giving his testimony under such a commission could be convicted of perjury? intimated that it would be better for the Defendant (if all the underwriters were willing to be bound by a third verdict.)

Verdict) to apply to the Court to put off the trial for the absence of material witnesses, till the Defendant could obtain a commission from a Court of Equity; at the same time saying, that if the Plaintiff should oppose the rule on the ground suggested by *Adair*, it must be discharged. Accordingly a rule *nisi* was taken in this way.

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Cockell and *Heywood* Serjts. now shewed for cause an affidavit, stating, First, that the Defendant had already obtained an order for six days time to plead on an undertaking to plead ifswably, and take short notice of trial; the Defendant therefore was bound by the terms of his own rule, and could not in violation of it apply to put off the trial: Secondly, That previous to the action's being discontinued in the King's Bench the underwriters had hurried the Plaintiff on by threatening a *non pros*. They contended that there was no fact to be brought forward by the additional witnesses which the Defendant was not as much aware of at the last trial as at the present time; and said that the Court of King's Bench had constantly refused commissions to examine witnesses where great contradiction of evidence had been expected, as in cases respecting the sea-worthiness of a ship.

Adair and *Shepherd* Serjts. in support of the rule said, that the underwriters had hurried on the Plaintiff in the King's Bench for no other purpose than to compel him to make his election of discontinuing, or proceeding to trial: and that the Plaintiff's case would be ultimately expedited by this temporary delay, as all the underwriters would be bound by a third verdict if the additional evidence were procured.

EYRE Ch. J. The proposal made on the part of the underwriters to be bound by a third verdict was worth the Plaintiff's consideration. He probably has good reasons for refusing to accede to it. The proposal is at least strong proof that this motion was not made merely for delay, and that the Defendant had some hopes of obtaining evidence which might turn the verdict in his favour. The Plaintiff however thinks fit to stand upon his rights: he refuses to consent, and we are called upon for a decision. The question then is, whether the Court should, under the circumstances of this case, give the Defendant till next term to enable him to apply to a Court of Equity. The reasons ought to be very many, and very strong, to induce us to grant this favour. On the motion for a new trial here, it was proposed to the underwriters to consent to be bound by a third verdict, as the two

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former were contradictory, but this was not acceded to. I lay no other stress on that circumstance, than as it proves that the underwriters chose to proceed in the most adverse way. From that moment, therefore, they should have set about procuring the necessary evidence for their defence. They understood their cause at that time as well as they do now; and yet they did not apply to a Court of Equity for a commission, as a large body of underwriters usually does. They first hurry on the Plaintiff in the King's Bench, and then obtain time to plead on the usual terms. After all that has passed it is impossible for the Court deciding adversely to put off the trial of this cause in order to give the Defendant the opportunity of applying to a Court of Equity, which he has lost by his own neglect.

BULLER J. Whether these underwriters ought to be satisfied with the last verdict, or whether they act wisely in persisting, are questions which the Court has nothing to do with. The Defendant does not now come in the ordinary course of justice, but is asking what he is not entitled to of right, and what, if granted, will be to the prejudice of the Plaintiff. I observe that the Defendant does not pretend to produce evidence of any new fact, of which the underwriters were not apprized at the time of the first trial; it seems that he has only got four or five witnesses more to prove the same thing. But that ought not to have any weight. I have always told a jury that if a fact is fully proved by two witnesses, it is as good as if proved by a hundred. I do not know that the Court of Chancery would grant a commission of this kind of course: I think not. Taking into consideration the circumstance of the Defendant having bound himself by the terms of the order not to delay the Plaintiff, I am of opinion that this rule should be discharged with costs.

ROOKE J. The Plaintiff having refused to consent to put off the trial, the case must stand on its own merits, and as the Defendant has entered into terms, he ought not now to be allowed to delay the Plaintiff. But I think it would be going too far to discharge the rule with costs.

EYRE Ch. J. said; that as the Defendant had not disclosed by his affidavit that he was under terms, he concurred in the opinion, that the rule should be discharged with costs.

Rule discharged with costs.

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LEOMINSTER Canal Company v. COWELL and
Another.

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REPLEVIN of a boat taken belonging to the Company. Avowries, 1st, That by the 31 Geo. 3. c. 69. the Company was authorized to enter into the lands of any person, and set out such parts as they should think necessary for the canal; making a recompence for all damage done by a sum in gross or by an annual rent to be charged upon the rates; that a power was given to distrain the boats of the Company upon the canal in case *sueh rent* should be in arrear twenty-one days; that the Company entered into and damaged the avowant's lands; that the recompence was adjusted by an annual rent, and because that was above twenty-one days in arrear he distrained, &c. 2d, That after the passing of 31 Geo. 3. c. 69. a sum was due from the Company to the avowant for rent on account of land set out and damaged, and afterwards adjusted according to the provisions of the said act. These facts having been traversed and found for the avowant and judgment entered accordingly, *Williams Serjt.* on a former day obtained a rule to shew cause why the prothonotary should not be directed to review his taxation, he having allowed double costs.

Clayton Serjt. now shewed cause. The Canal Act gives a distress for rent, and says, if it is not redeemed it may be appraised and sold "in such manner as the law directs in cases of distress for rent." If this clause be coupled with 11 Geo. 2. c. 19. s. 22. it will entitle the avowant to double costs. This is a case between landlord and tenant; the rent *eo nomine* is to be paid to the owner of the land while the damage continues, and unless it is purchased there is a reversion of the land itself to him as soon as it shall cease. The benefit of 11 Geo. 2. is not confined to cases where the avowry pointed out by that act is used; a party is still at liberty to avow at length, though if he does, he must prove his title *in omnibus*. At any rate however the second avowry is general. The case of *Loyd Esq. v. Winton*, 2 Wilf. 2&. where double costs were not allowed, was a case of seizure for a heriot custom and not a distress for rent, and is therefore very distinguishable from the present.

Williams Serjt. contra. The first avowry is admitted to be under this canal act, but it is contended that the second is general. That however would be bad on demurrer unless supported by this act,

A rent charged on the rates by a canal act as a compensation for damage done to land, is not within the 11 Geo. 2. c. 19. s. 22. so as to entitle an avowant to double costs; nor is any rent-charge.

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for in a case between landlord and tenant the distress must be taken upon the premises; whereas here the boat was not taken on the avowant's premises, but on the canal. The 11 Geo. 2. was made to remedy the difficulty landlords had in setting out their title on the record, and only gives double costs in cases of avowries under that act. This is strongly shewn by the case in 2 Wilf., where the Court refused to extend that act to an avowry for a heriot custom. The words "appraised and sold in such manner" as the law directs in cases of distress for rent," does not apply to 11 Geo. 2. but to 2 W. & M. Jeff. 1. c. 5. which first enabled the party to sell what was a mere pledge at common law.

EYRE Ch. J. (stopping *Williams.*) We need only look at the *Leominster Canal Act* to be satisfied that this is not a distress for rent within the meaning of 11 Geo. 2.; the distress intended to be protected by that act, is a distress for a certain rent directly reserved by a landlord on his grant or demise of land theretofore made. In that case the landlord may avow generally, and is entitled to double costs. But this is a distress for rent by the *Canal Act* charged on the rate; it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 Geo. 2.

Per Curiam,

Rule absolute. (a)

(a) Vide also *Leominster Canal Company v. Norris* and another, 7 Term Rep. 500., where the same point was contended and the same judgment given by the Court of King's Bench. A motion had also been

made in this case similar to that in the King's Bench, on the ground of the insufficiency of the avowries; but was abandoned after the decision of that Court.

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2 New Rep. 180.

It is not sufficient to stick up a notice of declaration in the office if the defendant's last place of abode is known; for it ought to be served there.

HOLSTEN v. CULLIFORD.

CLOTTON Serjt. shewed cause against a rule nisi for setting aside the interlocutory judgment in this case, and produced an affidavit of the clerk to the Plaintiff's attorney, stating, that he had stuck up the notice of declaration in the office, "not knowing where the defendant was to be found."

The Court (after conferring with the officer) said, that if the Defendant was not to be found after due search the notice of declaration ought to be served at his last place of abode, or at least it should be sworn on the part of the Plaintiff that the Defendant's last place of abode was not known.

Shepherd Serjt. for the Defendant.

Rule absolute.

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BURNSALL v. DAVY and others.

THIS was a case from the Court of Chancery, the substance of which was as follows:—

David Burnsall deceased, being seised in fee of and lawfully entitled unto certain freehold and leasehold estates, by his will dated the 26th November 1791, duly executed and attested so as to pass his real estates, gave and devised as follows, that is to say,

"I do hereby give, devise and bequeath all and every my freehold and leasehold estates and all other my estates whatsoever both real and personal (subject and chargeable as therein mentioned) after payment and discharge of all my debts legacies and my funeral and testamentary charges and expences and the expences in and about executing this my will unto my niece Mary Owftwick otherwise Ellard and the issue of her body lawfully to be begotten as tenants in common (if more than one), but in default of such issue or being such if they shall all die under the age of twenty-one years and without leaving lawful issue of any of their bodies, then I devise the same unto my cousin Peter Davy and the issue of his body lawfully to be begotten as tenants in common (if more than one) but in default of such issue or being such if they shall all die under the age of twenty-one years and without lawful issue of any of their bodies or in case neither he nor any such his lawful issue (if any) shall take upon himself or themselves the surname of *Burnsall* in virtue of an act of parliament or other legal method to be made or taken for that purpose within the space of two years after coming into the possession of the same estates and property by virtue of this my will, that then and in either of such cases happening the same estates and property shall actually go, and I for that purpose hereby give devise and bequeath the same to *Stephen Ganton* his heirs executors or administrators for ever, but recommend and hope that he they or some or one of them will take upon himself herself or themselves my said surname of *Burnsall*."

Power was given by the will to *Mary Owftwick* otherwise *Ellard* at any time or times during her life, and to *Peter Davy* at any time or times during his life, when and as they should respectively come into and be in the actual possession of the said estates and property to grant the freeholds upon building leases for seventy years, and to grant either the freeholds or leaseholds upon other leases for twenty-one years.

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13 Feb 362.
2 Bof & Pst.
490.
A. devised all his freehold and leasehold estates to *B.* and the issue of her body "as tenants in common, but in default of such issue, or being such, if they should all die under twenty-one and without leaving issue" then over: held that all the limitations subsequent to that to *B.* being contingent, the remainders in the freehold were barred by fine and recovery, but that the leasehold vested in the remainder-man on the death of *B.* without issue.

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David Burnfall afterwards died without altering his said will, leaving the said *Mary Owftwick* otherwise *Ellard* (who was then the wife of the Plaintiff) his niece and heiress at law, and the said *Peter Davy* and *Stephen Ganton* him surviving.

Mary Owftwick the niece is since dead, without ever having had any issue, but she and her husband before her death, and within two years after the death of the testator, took upon themselves the surname of *Burnfall*, in pursuance of the said testator's will, and by the authority of His Majesty's letters patent, granted to them for that purpose; and soon after the testator's death entered upon the freehold estate and suffered recoveries, and levied fines thereof to the use of such persons and for such estates as the said *Joseph Ellard* and *Mary* his wife should appoint. And for default of appointment to the use of *Joseph Ellard*, for the joint lives of himself and his wife, and after the decease of either to survive for his or her life, with remainder to the heirs and assigns of *Joseph Ellard* in fee.

The questions for the opinion of the Court were, 1st, What estate and interest the said *Mary Owftwick* otherwise *Ellard* took under the testator's will, and the recoveries and fines in the testator's freehold estates? 2dly, What estates the said *Mary Owftwick* otherwise *Ellard* took under the testator's will, in the said testator's leasehold estates? 3dly, What estate the Defendant *Peter Davy* took under the said will in the testator's freehold estates? 4thly, What estate the Defendant *Peter Davy* took under the said will in the testator's leasehold estates?

This case was argued in Easter Term last by *Palmer Serjt.* for the Plaintiff, and *Williams Serjt.* for the Defendant.

Palmer Serjt. *Mary Owftwick* took an estate tail in the freehold, and an absolute estate in the leasehold property. It is manifest that both kinds of property were intended by the devisor to go together to the same description of persons; it is therefore only necessary to establish, that an estate tail in the freehold passed, and an absolute estate in the leasehold will follow of course. The interest of *P. Davy* in the freehold being contingent, is at all events barred by the recovery, whether *M. Owftwick* took an estate for life or in tail. If she took an estate tail the contingency is manifest. But suppose it to be an estate to *M. Owftwick* for life, remainder to her children for life, still the interest of *P. Davy* would not be absolute on the determination of those estates; for if

one

one of the children had arrived at the age of twenty-one or had left issue, *P. Davy* could not have taken any thing. If we were merely contending for the freehold, we need only cite the decision between these parties, *6 Term Rep.* 34.; it is for the purpose of the leasehold only, that it becomes necessary to discuss what estate *M. Oystwick* took. The prefatory words "all my freehold and leasehold estates" are not sufficient to give an estate in fee to the children; for though great stress has been laid upon such words, where a question has arisen between the devisee and the heir at law in cases where all has been devised by such prefatory words, and something remained undisposed of by the particular clauses of the will, yet in this case every thing has been devised away, and the only question is, Whether *A.* or *B.* shall have a particular part of it. The only cases where the word "issue" can be construed to be a word of purchase, are, 1st, where an express estate for life is given to the ancestor, remainder to his issue and the heirs of such issue; in which case the term "issue" denotes some individual, because the subsequent words of limitation are inconsistent with the ancestor's taking the whole estate. 2dly, Where a personal estate is given to the ancestor for life and to his issue without any disposition over; but there is no instance of such a construction being put upon the word "issue" in cases of freehold estates without subsequent words of limitation. The Courts have construed such words as appear to give an estate for life only, as giving an estate of inheritance, where the property would otherwise go to a different family from that which was intended to take, *Roe v. Grew and others*, *2 Wilf.* 322. *Robinson v. Robinson*, *1 Burr.* 38. and in *Doe v. Applin*, *4 Term Rep.* 82, where the devise was to *W. D.* of a freehold estate for life, and after his decease to and amongst his issue, and in default of issue then over, the Court went so far as to reject the words "and amongst" in order to effectuate the general intention, and held that *W. D.* took an estate tail. On the same ground the Court in this case may, if necessary, reject the words "tenants in common." In *Doe v. Applin*, Lord *Kenyon* thought that the general intention would fail for want of limitation to the issue. Here if the word "issue" be understood fully, that is including all descendants, it must be considered as a word of limitation: if it be considered as designating one or more persons only it must be confined to issue born in the life of the deviser, *Cook v. Cook*, *2 Vern.* 546. But the same word cannot be construed to mean two things in the same breath: if the issue of *M. O.* would take

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take by purchase, the words "lawful issue of their bodies" must be confined to issue to be born within a limited time, to the exclusion of their general descendants. But to say that it is an estate for life to *M. O.* and then over, would be directly contrary to all the cases where the general intention of the testator has been adopted, notwithstanding particular words which seem to contradict it.

Williams Serjt. contra. I shall contend that *M. Owftwick* took an estate for life with contingent remainders to her children in tail, and that the remainder over to *Peter Davy* was a vested remainder. This is with a view to the freehold, and if I can establish a right to that the leasehold will follow of course. The general intention of the testator may be effected, without giving an estate tail to *M. O.*, for if she take an estate for life with cross remainders to her issue in tail, the remainder to *Peter Davy* will not take effect till all her issue is extinct. The words of the will are "as tenants in common if more than one." Now, cross remainders may be intended here, for, if on the face of the will they appear necessary to the intention of the testator, the Court will imply them. In *Doe v. Wainwright*, 5 Term Rep. 427., Lord Kenyon said, "No technical precise form of words is necessary to create cross remainders." Here the intention is manifest from the words "if they shall all die under the age of 21 years, and without leaving lawful issue of their bodies." The ground of the decision in *Doe v. Appelin* was, that no cross remainders could be implied: and there Mr. J. Buller said, that in rejecting the words "and amongst," the Court would be going farther than they had gone in any former case. In the next place, the issue of *M. O.* would have taken an estate tail, in which case *Peter Davy* took a vested remainder. In *Luddington v. Kime*, 1 Ld. Raym. 203. 1 Salk. 224. 3 Lev. 431. it was held, that where the mesne estates are particular estates, the remainder limited over may vest. In this case the testator gives an estate "to the issue of the body of *M. O.* as tenants in common, if more than one;" now it is clear that if the will had stopped there, the children could have taken only an estate for life, and the remainder to *Peter Davy* would be vested: and the subsequent words only subject that remainder to be divested by issue. But admitting the subsequent words to be words of inheritance, it is impossible that they should give a fee: for even supposing that the devise had been to the issue of *M. O.* and their heirs, the subsequent words "without lawful issue of their bodies" would restrain

restrain the general expression of heirs, to heirs in tail. 19 H. 6. 74 b. cit. *Dougl.* 266. in *notis*, and if that be the case, where a fee is expressly given, *a fortiori* it will be so where the estate given is not so large. The case of *Doe v. Laming*, 2 *Burr.* 1100, is much stronger than this, for "heirs" is a more technical expression than "issue," and yet the Court there in order to effectuate the general intention of the testator restrained the estate of the first taker to an estate for life. So in *Doe v. Reason*, cit. *Doe v. Holmes*, 3 *Wilf.* 245. *Ryder Ch. J.* said, that "after the death of the tenant for life, the issue (which in a will is a word that operates as effectually to make an estate tail as the words heirs of the body do in a deed) are to take as purchasers, for the devise is to the issue of the body of the niece, and to the heirs of such issue." The words used by the devisor in this case "without leaving lawful issue" are sufficient to give an estate tail; nor does the addition of the words "if they shall all die under the age of twenty-one years" make any difference, for the remainder could not take effect till failure of issue. *Soule v. Gerrard*, Cro. Eliz. 525. *Moor* 422. *Brownword v. Edwards*, 2 *Vex.* 248. If the children were to take an estate in fee, why should the testator have limited over to *Peter Davy*, and have required him to obtain an act of parliament in order to take the name of *Burnfall*, since if they were once possessed of a fee they might dispose of it to a stranger to that name? Such a construction would defeat his apparent intention of giving the estate over to a collateral relation who should take his name, on failure of issue of the children of M. O. At all events, whether the children of M. O. would have taken an estate in fee or in tail, *Peter Davy* is equally entitled to the leasehold. In *Doe v. Lyde*, Term Rep. 596. it was laid down as a general principle, that where there is an express limitation of a chattel, by words which if applied to a freehold would create an *express estate tail*, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. But where there is no such *express* legal limitation the Court will consider the intention of the testator." The recovery in this case certainly could not affect the leaseholds, for they did not pass to make a tenant to the *præcipe*.

Palmer in reply. No doubt a remainder limited to a person in being, after preceding limitations to persons not in being, may open and let in those persons when they come *in esse*; but the idea of vesting and afterwards devesting would destroy the distinction between

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tween vested and contingent remainders. As long as it is uncertain whether the party will ever take any thing, the remainder is contingent, but a vested remainder takes effect immediately, in interest, and will take effect in possession by lapse of time; it may open, but continues vested because certain. The remainder to *Peter Davy* was therefore contingent, since if any of the children had arrived at the age of twenty-one, he could have taken nothing. The case of *Doe v. Wainwright* proves nothing, for cross remainders were there created, though not in technical language. Indeed the distinction with respect to cross remainders is this, between two the presumption is in favour of them, between more than two, against (a) them. If the Court can imply cross remainders in this case, they might have been implied in *Doe v. Ardin*. It is not disputed that if the estate had been limited to the issue of *M.O.* and their heirs, the word "heirs" might be qualified to mean heirs in tail; but here no such qualification can take place, as no such words of limitation are added. There is no case where the Court has enlarged the estate of the second taker for the purpose of effectuating the general intention of the testator; if in *Robinson v. Robinson* they could have done so, they might have effectuated the intention of the testator more completely.

EYRE Ch. J. Technical rules are not to be relied upon in explaining the intention of testators: and yet cases of intention are much embarrassed by authorities. If this case were stripped of all authorities I would inquire what was the intention of the testator, as it appeared from the circumstances of his family, and the words of the will: and next I would examine the rules of law, to see how far the intention of the testator was consistent with them. An anxiety to effectuate what has been considered as the leading intention of testators has introduced all the difficulty in this kind of cases. It often happens that a testator means to limit his estate in a way which the law does not allow. The only words in this case which raise any difficulty in my mind are these "if they shall all die under the age of twenty-one years;" if they were omitted it would be a simple case. There were two branches of the testator's family on whom, being the principal objects of his bounty, he intended to settle his property in succession, and on failure of whom he intended that it should go over to *Peter Davy*. He devises first, to *Mary Owstwick*, and secondly to the issue of her body: if the first taker died without issue he meant that the

(e) *Perry and Others v. White*, in Error, Corp. 780.

estate

estate should go to another person; again, if the first taker left issue, and they all died without issue, the objects of the testator's bounty in his own family being gone, the property was to go over. This being clearly the intention, how is it to take effect? If it were not for the words "if they shall all die under the age of twenty-one years," I should be of opinion that this must be construed to be an estate for life to *M. O.* remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over to the next branch. But I am at a loss to know what to do with those words. If I were perfectly satisfied with the rejection of the word "amongst" in *Doe v. Applin* (a) I would reject them, and consider this as a devise over in case the issue of *M. O.* should die without leaving lawful issue of any of their bodies.

BULLER J. I incline to think that it will be impossible to reject the words "if they shall all die under the age of twenty-one years." There is a circumstance attending this will which might give reason to suppose that the testator had something of a legal understanding. Suppose that he knew for how long a time he could tie up his property? By the words of the will the estate is given to *Mary Owftwick*, and the heirs of her body as *tenants in common* if more than one; now "tenants in common" can only apply to the issue, for she and one of the issue could never take as *tenants in common*; the power of leasing given to *M. O.* while in possession confirms me in my opinion that she was to take an estate for life only, and that the whole estate was to go to her issue after her death. Possibly the testator reasoned thus: "I will give an estate for life to *M. O.* with an estate tail to her children till they arrive at twenty-one, and then a fee, at which time the law will give them a fee by means of a common recovery." If this construction be right the remainder to *Peter Davy* is contingent; for it does not solely depend on the determination of the preceding estate. If a child of *M. O.* had attained the age of twenty-one, and afterwards died without issue, the estate would have gone to *Peter Davy*, for the contingency must happen before the estate can vest at all. With respect to the leasehold property it is perfectly clear, that it cannot be touched by fine or recovery.

The Court took till this term to consider of their opinion, when the following certificate was sent to the Lord Chancellor:

We are of opinion, 1st, That under the will of this testator *Mary Owftwick* otherwise *Ellard* took an estate for life in the testator's freehold estates with contingent remainders to the other persons mentioned in the said will, which contingent remainders were barred

(a) *Vid. Doe & Bean v. Holley*, 8 T. R. 7. n. (c)

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¹ *Eql's. Rep.*
²³⁴

by

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by the fines and recoveries levied and suffered by *Mary Owftwick*, by force whereof *Mary Owftwick* became seised of an estate fee in the said estates.

2dly, That *Mary Owftwick* took an estate for life in the testator's leasehold estates.

3dly, That under the said will *Peter Davy* took an estate for life in remainder in the said freehold estates on the contingent therein expressed, which estate with all the subsequent limitations were afterwards barred by the fines and recoveries suffered *Mary Owftwick*.

4thly, That under the said will *Peter Davy* became absolute entitled to the testator's leasehold estates on the death of *Mary Owftwick* without issue.

12th Feb.

JAS. EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

Feb. 12.

2 B&F. & P.L.
12. 72. 549.

To assumpit on a bill of exchange the Court will not allow a Defendant to plead the general issue, and that the bill was given on a stock-jobbing transaction contrary to 7 Geo. 2. c. 8.

SHAW v. EVERETT.

*L*Ex BLANC Serjt. shewed cause against a rule nisi for pleading several matters to assumpit on a bill of exchange, 1st, The general issue. 2dly, That the bill was given on a stock-jobbing transaction contrary to 7 Geo. 2. c. 8. He contends that any thing which went to impeach the consideration of the note might be given under the general issue, and that the object of this application on the part of the Defendant was to govern the time in which a notice of trial might be given for the next fittings, by introducing a long replication.

And the Court being of this opinion,

Discharged the Rule. (

Adair Serjt. for the Defendant.

1 New Rep.
223.

(a) In this term in a case of *Angerstein* rance was discharged by the Court; *Shaw v. Vaughan* a similar rule for pleading, *berd* Serjt. for the Plaintiff; *Heywood* 1st, the general issue, and 2dly, alien enemy, to a declaration on a policy of insu-

Mr. J. HEATH was absent from the 29th of January to the end of the Term from indisposition.

THE END OF HILARY TERM.

C A S E S

798.

ARGUED AND DETERMINED

IN

THE COURTS OF COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

M'COLLAM v. CARR.

ASSUMPSIT for seaman's wages. The declaration contained two counts, one on a special contract, and another for work and labour generally. At the trial the Plaintiff attempted to prove that he had been pressed out of the ship with the collusion of the Defendant, but failed to establish that fact. The Defendant had paid him a certain sum as wages up to the period of his quitting the ship, but having made a small mistake in calculating the time, the Plaintiff obtained a verdict for 1*l.* 2*s.* on the last count.

Shepherd Serjt. now moved for leave to enter a suggestion on the Roll, under 23 Geo. 2. c. 33. that the Defendant was resident in Middlesex, and liable to be summoned to the County Court. He contended, that as the principal part of the debt had been actually paid, and was not merely to be done away by a set-off, the Plaintiff had no demand on the Defendant beyond the sum of 1*l.* 2*s.* at the time when he commenced his action.

April 26th.

Vide sicutem this
case impeached,
8 *Eas.*, 28.

14 *Eas.*, 302.

The jurisdiction
of the Court of
Conscience does
not extend to
contracts made
on the high seas;
nor will the
Court allow a
suggestion for
double costs un-
der 23 G. 2. c. 33.
where the origi-
nal debt being
above 40*s.* has
by a balance of
accounts been
reduced below
that sum.

EYRE

CASES IN EASTER TERM

1798.

M'CULLAM
v.
CARR.

EYRE Ch. J. Does the Court of Conscience try contracts made on the high seas, by considering them as if made in the parish of *Saint Mary le Bow* in the Ward of *Cheap*? These actions though transitory as to the superior Courts are not so as to the Court of Conscience: clearly therefore, the cause of action in this case did not arise within the jurisdiction of that Court. Besides the action arises on a contract, part of which has been satisfied by money on account. Is there any case where the ultimate balance of an account only being under 40s. the Court has allowed a suggestion? (a) I should pause upon such a case since the most intricate point in accounts between merchant and merchant might by this means come to be decided before a County Court. It seems to me that the original demand ought to be under 40s.

Shepherd took nothing by his motion. (b)

(a) See *Fitzpatrick v. Pickering*, 2 Wils. 68; *Graf v. Fijber*, 3 Wils. 48.

(b) An application of the same nature having been made under similar circumstances in *Bell v. Martin*, in Trinity Term following, both these points again arose, when the Court adhering to the above determination refused a rule to shew cause. *Pitts v. Carpenter*, 1 Wils. 525. *Heward v. Hopkins*, Doug. 449.

VAUX v. ANSELL.

April 26th.

An annuity memorial stating that the consideration money was paid to A. B. and C. "some or one of them" is bad: though it appear that the money was paid on the day on which the deed was executed by them all.

A RULE nisi for setting aside an annuity having been obtained on a former day on the ground of the following defect in the memorial, viz. that the consideration money was stated to have been paid to A. B. and C. "some or one of them;"

Adair Serjt. now shewed cause, and contended, that as it appeared by the indorsement on the deed that the money was paid on the same day on which the deed was executed by all three parties, it might be presumed that they were all present at the time of payment, and therefore payment to any one of them was a payment to all.

The Court however observed, that as the payment appeared to have been made on the same day only, and not at the same time when the deed was executed by all the parties, it could not be presumed that they were all present at the time of payment.

Adair then offered to produce an affidavit of that fact; But the Court were clearly of opinion that a defect of this kind in an annuity memorial could not be remedied by a subsequent affidavit.

Rule absolute.

Shepherd Serjt. in support of the rule.

1798.

BURBIGE v. JAKES.

This was an action on the case for raising the footpath on each side of the Plaintiff's house, by which the water was collected immediately in front of it. The declaration stated that the Plaintiff was possessed of a messuage "at Sheernes in the county of Kent." At the trial it was proved, that the house was situate in the parish of Minster, which is contiguous to Sheernes; that Sheernes is extraparochial; but that both places usually go by the name of Sheernes. A verdict having been found for the plaintiff, Shepherd Serjt. now moved for a rule nisi, to set it aside and enter a nonsuit on the ground of the variance between the declaration and the evidence, arguing that though Westminster usually goes by the name of London, yet that it is not sufficient to lay it in pleading.

The Court (*absente* EYRE Ch. J.) were of opinion that as the house was not stated to be in the *parish* of Sheernes it was well enough, since it appeared to be within the *district* of Sheernes.

Shepherd took nothing by his motion.

April 27th.

I Tum. 570.
Evidence of a
house situate in
the parish of M.
will support an
averment of a
house "at S."
S. being extra-
parochial, and
both places
usually going by
the name of S.

WEBB v. MATTHEW.

May 3d.

The bail having been rejected, in this action, in which no bail-bond had been taken, the Plaintiff brought escape against the Sheriff.

Cockell Serjt. for the Defendant, now moved to justify new bail, which was opposed by

Marshall Serjt. on two grounds: 1st, That the new bail were described in the notice as *added*, whereas both the former bail having been rejected, there was no bail in the cause to which they could be added (but this objection was immediately overruled by the Court): 2dly, That if the new bail were allowed, it would afford an answer to the action against the Sheriff which had been commenced on sufficient ground: he cited *Fuller v. Prest*, 7 Term Rep. 109.

Cockell contended, that *Fuller v. Prest* did not apply, as in that case the application was made on the part of the Sheriff, who came to ask a favour: but that here the Defendant not being implicated in

The Court will
not permit a
Defendant
justify bail after
an action for an
escape com-
menced against
the Sheriff, who
has neglected to
take a bail bond.

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WEBB
v.
MATTHEW.

the Sheriff's misconduct should not be prevented from defendant the action.

The Court said, that as an action for an escape had been commenced against the Sheriff, if bail were now permitted to be given, the proceedings in that action must be stayed: and that the motion therefore ought to be considered in the same light as a application on the part of the Sheriff to stay proceedings against him in the action for the escape. That as the Sheriff had neglected to do his duty, he ought not to be relieved, for the Court could not too strongly mark his conduct in omitting to follow the directions of the statute (a). If there was any reason for making a private engagement it ought to have been made to the Plaintiff

Bail rejected

(a) 23 H. 6. c. 9.

May 5th.

NORTON v. FAZAN.

Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; held, that the husband should be liable for necessaries furnished to her unless it appeared that the Plaintiff knew or ought to have known the circumstances under which she was living.

ASSUMPSIT for necessaries sold to the Defendant's wife and children.

Some time previous to the delivery of the goods, the Defendant having discovered that his wife kept up an adulterous intercourse with another man, separated himself from her, leaving her in possession of the house which he had inhabited, together with two children bearing his name. In this house she was living in state of adultery, at the period when the goods in question were delivered. The Defendant had made no regular provision for his wife. The cause was tried before *Eyre Ch. J.* at the Sitting at *Westminster* in *Easter Term*, who was of opinion that if the Plaintiff knew or ought to have known that the separation proceeded from the adultery of the wife, the jury should find for the Defendant; if not, that the Plaintiff was entitled to recover. Verdict for the Plaintiff 2*l.* 10*s.*

Clayton Serjt. now moved for a rule calling on the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered. He contended, that whether the Plaintiff had notice of the adulterous intercourse or not was immaterial, and cited *Morris v. Martin*, 1 *Str.* 647. *Manwaring v. Sands*, 1 *Str.* 706. and *Govier v. Hancock*, 6 *Term Rep.* 603., and that as the separation was notorious, and the adultery committed during the separation, the Defendant was discharged.

EYR

EYRE Ch. J. If the Defendant in another action brought against him by some other tradesman shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present this woman appears to have been living in a house in which she was placed by the Defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the Defendant can bring it home to any other tradesman who shall be in the same situation as the present Plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the Defendant may perhaps be able to prevent another verdict passing against him.

BULLER J. Every case on the facts is peculiar to itself, and this is so different from every other case which has been decided in *Westminster-hall* that I consider it as anomalous. The verdict is clearly and strictly right. The wife committed adultery for a considerable time while she was living with her husband; he voluntarily yielded his bed to the adulterer; and made no provision for her. Then what colour of defence is left? Knowing of her criminal conduct and having made no provision for her, he must maintain her as before.

HEATH J. I am of the same opinion.

ROOKE J. I am of the same opinion.

Clayton took nothing by his motion. (*a*)

(*a*) *1 Lev. 5.*

GREEN v. REDSHAW.

THE affidavit to hold to bail in this case was entitled "William Green Plaintiff against James Redshaw Defendant," but in the body of the affidavit it was stated, that *James Redshaw*, without adding the word "Defendant," was indebted &c.

A rule nisi for entering a common appearance having been obtained on the ground of the affidavit being entitled,

Clayton Serjt. now shewed cause, and contended that as the affidavit was positive that *James Redshaw* was indebted, the title alone would not vitiate it, and that none of the cases went that length.

But the Court thought the objection good, saying that it was in consequence of a decision of this Court that the Court of King's

1798.

NORTON
v.
FAZAW.

May 5th.

2 *Beif. of Full.*
110. 298.

If an affidavit to hold to bail is entitled, it is bad. The Court will never allow a supplemental affidavit except to explain an ambiguity in the original affidavit.

CASES IN EASTER TERM

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GREEN
v.
REDSHAW.

Bench had made a rule (*a*) that no affidavits to hold to bail should be entitled.

Clayton then applied for leave to file a supplemental affidavit and cited *Hollis v. Brandon*. (*b*)

Sed per Eyre Ch. J. The Court will never receive a supplemental affidavit unless to supply something which is ambiguous the face of the original affidavit; and which the Court for its satisfaction wishes to have explained; and on this ground I decline the offer of leave to file a supplemental affidavit in *H v. Brandon*. But if it were allowed in this case, it would be making that right which was wrong at the time when it was done and would be in the nature of an amendment.

Per Curiam,

Rule abso

(*a*) *Vid. Clarke v. Cawthorne*, 7 Term. Rep. 321. and Reg. Gen. Trial. 37 Geo. 3.
B.R. 7 Term Rep. 454.

May 8th.

MADDOCKS v. HOLMES and others.

The Court will not restrain a Defendant from pleading the Statute of Limitations on setting aside a regular interlocutory judgment.

SHEPHERD Serjt. having moved for a rule nisi to set aside a regular interlocutory judgment which had been signed in case for want of a plea, on the terms of paying the costs, plea *instanter*, taking short notice of trial for the Sittings after Term and giving judgment as of the Term;

Marshall Serjt. said he was instructed to oppose this motion in the first instance unless the Defendants should be restrained from pleading the Statute of Limitations, and cited *W v. Atterton*, 1 Bl. 35. to shew that the Court never let in a plea where they set aside a regular judgment. (*a*)

But the Court said, that the plea of the Statute of Limitations was not necessarily unconscientious, and that of late it had been considered as a fair plea in the *King's Bench* (*b*), though formerly it had been thought otherwise.

Rule absolute on the terms proposed

(*a*) See also *Forbes v. Ld. Middleton*, 2 Sir. 1242. (*b*) *Rucker and another v. Hanway*, 3 Term Rep. 124.

1798.

GRINDLEY and another v. BARKER and Others.

TRESPASS for seizing, detaining and converting certain hides of leather, the property of the Plaintiffs.

Plea, justifying the seizure and detainer for that after the making of 1 Jac. 1. c. 22. entitled an act concerning tanners curriers shoemakers and other artificers occupying the cutting of leather to wit on &c. John Barker John Pym Robert Pownds and John Matthison (the Defendants) and also Henry Matchwick John Thomas Wolley Thomas Slack and Thomas Mead being substantial honest and expert persons and being freemen of some of the companies of cordwainers curriers saddlers or girdlers within the city of London that is to say the said John Barker being a freeman of the company of curriers &c. &c. (averring the companies to which each belonged) were duly appointed according to the form of the said act of parliament by William Curtis, he the said W. C. then being Lord Mayor of the City of London, and the aldermen of the said city for the time being, searchers to view and search all and every tanned hide skin or leather which should be brought as well to the market at Leadenhall, as to any other fair or market therefore usually appointed within three miles of the said city, of whom the said Thomas Mead was then and there duly appointed a sealer, and were afterwards on &c. duly sworn before the said W. C. and the said aldermen to do their office truly; and that afterwards and while they continued such searchers as aforesaid to wit on &c. the said hides of tanned leather abovementioned were offered and put to sale by the Plaintiffs, the said Plaintiffs then and there using the mystery of tanning in the market of Leadenhall in the said act mentioned being within the jurisdiction of the said city: And the Defendants further say, that the said hides had not after the tanning thereof been well and thoroughly dried, according to the intent and meaning of the said act: wherefore the said Defendants so appointed and sworn as aforesaid on &c. at the market of Leadenhall aforesaid and within the jurisdiction of the said city by virtue of their said office seized and carried away the said hides of tanned leather above-mentioned, and detained them in their custody until they might be duly tried in manner and form as is directed by the said statute as it was lawful for them to do: and the Defendants say that within a reasonable and convenient time

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If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. A condemnation by four out of the six tasters of leather, appointed under 1 Jac 1. c. 22. (the whole number being met for the purpose of trying,) must be considered as the condemnation of all six.

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after the said seizure to wit on &c. they the said Defendants gave notice to *Brook Watson* Esq. he the said *B. W.* then being Lord Mayor of the said city, of their having so taken and seized the said hides for the cause aforesaid, in order that the said Lord Mayor might in due manner appoint triers for the trying of the same according to the directions of the said statute to wit at &c. which is the said trespass &c. And this &c. Wherefore &c.

Replication tendering issue on the fact of the hides not being well dried. New assignment, that after the seizure of the said hides of leather and within six days after notice thereof had been given to the said Mayor of the said city to wit on &c. the said Mayor according to the form of the said act did in due manner elect and appoint six honest and expert men to wit *Joseph Lacey, George Murray, Edmund Sylvester, Samuel Norris, Samuel Brooks and William Webster*, the said *J. L.* and *G. M.* then and there being of the better sort of the company of cordwainers, the said *E. S.* and *S. N.* then and there being of the better sort of the curriers of *London*, and the said *S. B.* and *W. W.* then and there being of the better sort of tanners using *Leadenhall* market, and no one of them being of kin or affinity to the said Plaintiffs as triers for the trying, amongst others, of the said hides so seized as aforesaid; which said six persons according to the said act of parliament upon their corporal oaths taken before the said Mayor did on the second market day holden upon the *Tuesday* for leather next after the said seizure in the afternoon of the same day being the ——day &c. to wit at &c. inquire straightly examine and try whether the said hides were sufficiently serviceable or not according to the intent and true meaning of the said act: And the said Plaintiffs say that upon such inquiry examination and trial the said *S. B.* and *W. W.* differed from the said four other persons so appointed triers as aforesaid with respect to the verdict which ought to be given concerning the said hides and the said *S. B.* and *W. W.* then and there refused to find the same insufficient or unserviceable, and the said hides were found and returned insufficiently dried and accordingly condemned by the said *J. L. E. S. G. M. and S. N.* only without the concurrence of and in opposition to the said *S. B.* and *W. W.* and no other trial finding or adjudication hath been had or given in relation to the said hides. Of all which premises the said Defendants afterwards and before the commencement of this action to wit on &c. at &c. had notice. And the said Plaintiffs further say that they brought this action not only for the trespasses in the introductory part of the plea mentioned and thereby attempted to be justified but

but also for that the said Defendants after the said *S. B.* and *W. W.* had refused to find the said hides of tanned leather to be insufficient or unserviceable, and also after the said Defendants had such notice as aforesaid, to wit, at &c. kept and detained the said hides for a long space of time, to wit &c. and converted and disposed of the said hides to their own use in manner and form as the said Plaintiffs have above thereof complained against them. Which said trespasses above newly assigned are other and different &c. wherefore &c.

Pleas to the new assignment; 1st, Not guilty; 2dly, That the Defendants being such searchers as aforesaid, and having so as aforesaid seized the said hides, so as aforesaid offered to sale by the said Plaintiffs in the market of *Leadenhall* in the City of *London* by virtue of the said statute afterwards and after the same had been so as the said Plaintiff have above alledged found by the said triers appointed as aforesaid and the said Plaintiffs had by reason thereof forfeited and lost the same, the Defendants kept and detained the same in order that the said hides so forfeited, being leather seized within the City of *London*, by virtue of the said statute might be brought to *Guildhall* in *London* there to be prized by indifferent persons in manner and form as is by the said statute directed; as it was lawful for them to do, to wit, at &c. which are the same supposed trespasses &c. and this &c. wherefore &c.

General demurrer and joinder.

This demurrer was twice argued; first in *Hilary Term* last by *Shepherd* Serjeant for the Plaintiffs, and *Le Blanc* Serjeant for the Defendants, and now in this Term by *Cockell* Serjeant for the former and *Adair* Serjeant, for the latter.

Arguments for the Plaintiffs. The only question arising on these pleadings is, Whether the condemnation by four only of the triers was sufficient to warrant the detention of the leather? This will turn principally on the construction of *1 Jac. 1. c. 22.* By the preamble it appears that the former statutes upon this subject had been too sharp and rigorous, and that the Legislature intended that the goods of the subject should not be condemned unless by the concurrent opinion of the three branches of the trade, viz. the tanner, the currier, and the cordwainer, or at least by a majority composed of persons in those three branches of the trade. The object of the act as we may collect from *s. 6.* and *25.* was to keep the three branches of the trade distinct, and thus to prevent any bad leather being brought into the market, by making

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each of them a check upon the others. Where the act has given powers to any number of persons, it has cautiously expressed whether those powers were to be executed by the whole number only, by a majority, or by any particular individuals. Thus by *s. 15.* it is directed that "so much of the hide, &c. as shall be insufficiently tanned or dried shall be cut out by the oversight discretion and direction of the *triers* hereafter in this act to be appointed, upon the oaths of the said triers." So offences against *s. 21.* are to be tried "by the wardens of the curriers and the wardens of the Company whereof the party grieved shall be;" in which case it can never be contended that a majority of the curriers only would be sufficient. But in *s. 24.* it is provided that curried leather shall be searched and allowed "by the curriers of *London* for the time being *or such persons as they shall thereto assign.*" So the same expression is used in *s. 27.* And in *s. 29.* it is directed that "the Master and Wardens of the cordwainers, curriers, girdlers, and saddlers, *or the more part* of the said Master and Wardens of every of the said several mysteries shall make true search," &c. Thus too *s. 31.* having directed that eight persons should be appointed as searchers and sealers generally, it is added in *s. 32.* "that the said searchers *or any of them*" may seize. The 33d *sect.* of the act by which the triers are appointed, following up the idea of the preamble which had expressed that the trade had been oppressed by some laws that were too rigorous, enacts that to the end there might be an indifferent trial, the triers should be selected two from each branch of the trade, and very much assimilates them to a jury; they are not to be of kin or affinity to the owner of the leather, and they are upon their corporal oaths "to inquire, straightly examine, and try." Nor is it unreasonable to suppose that the Legislature intended all six to be unanimous, when the common law has in the case of a jury required the unanimity of twelve. This too is strengthened by the words at the end of *s. 35.* which directs that the persons appointed for trial of the leather shall do their duties therein without delay, "upon pain that every of them making default therein shall for every such several default forfeit and pay 5*l.*" This provision was probably added in contemplation of the triers not coming to an agreement. Supposing however that a majority of the triers may decide, still as the Legislature has anxiously composed this tribunal of the three branches of the trade whose united skill and experience would best ensure a just verdict; that majority must be

be composed of one at least of each of those three branches; whereas upon the present pleadings it appears that the condemnation in question was made by the two curriers and the two cordwainers, exclusive of the two tanners. There is no instance in which the majority of a number of persons appointed to try a fact can determine the question. In the Courts of Law though a majority of the judges decide, still they decide upon a question of law and not of fact, which makes a material distinction. Nor is there any analogy between this and the case of corporations; whose acts are either legislative or ministerial, relate to their own interests only and do not take away the rights of other persons, as the act of the majority in this instance does. In the case of elections the majority must of course bind the rest. Generally speaking however where any number of persons are appointed to do a particular act, they must all join. Thus in the *King v. Hobbes, Noy, 47.*, where a commission made out to six, four, or two, was executed by three, the execution was held void, and *Co. Litt. 181. b.* was there cited (a). It is observable also that where many number of persons are appointed by act of parliament, the majority of whom are intended to act, it is always so expressed.

Arguments for the Defendants. Three points are to be considered in this question. 1st, What is the general rule of law respecting authorities of this nature? 2dly, Whether any particular intent can be collected from this act to control the general rule of law? 3dly, Whether, if a majority can decide, one of each class composing the tribunal must not concur in the decision? 1st, There is no instance except that of a petty jury where unanimity is required in the exercise of a discretionary authority, and according to *Dyer, 218. in marg.* and *Hale P. C. 297. n. (c)*, it was not formerly required even in that case. So unanimity is not required from a grand jury, though twelve must concur. Besides, the triers in this case cannot be resembled to a jury as they are not assembled in the same manner, they are judges as well as jurors, there is no challenge and no means of keeping them together in order to make them agree. They most resemble

(a) Shepherd Serjeant mentioned a case which he said had been decided in K. B. about three years back, of _____ v. _____; that was an action on a bond given by the Defendant as security for a collector of the rates in St. Andrew's, Holborn; the local act had directed that the collector should be nominated by the commissioners, five of whom should be a quorum; the collector was elected by three, and it was held on a motion for a new trial that the surety was not liable, as the collector was not duly appointed. But *Eyre Ch. J.* laid, that if the appointment had been made by three, at a board consisting of five, he should have thought the appointment good.

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and therefore their votes were thrown away. The construction of 9 Geo. 1. c. 7. in the *King v. Beeston*, was expressly made with reference to the 43 of Eliz. the poor laws being all *in pari materia*. And the judgment of the Court in *Wittnell v. Gartham* did not proceed on the words of the statute, but on three other grounds: viz. The intent of the founder, the resemblance of the body to a corporation, and usage.

EYRE Ch. J. The true question in this case lies in a very narrow compass; it is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred, then this leather is not found insufficient, but if the operation of law on the finding of four, who are the majority of the body duly assembled, be, that their judgment is the judgment of the whole, and therefore the judgment of the triers; then the leather must be taken to have been found insufficient, and the Defendants are justified. On the first argument I thought this question would turn on two general heads of inquiry. 1st, What the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? 2dly, Supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this act?

With respect to the first question, I think it is now pretty well established, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further: there it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet, and when they have met, they become just as competent to decide as if the whole had met. With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case in *Atkyns* shews the opinion of a great Judge, Lord Hardwicke, who was much conversant with this subject in one part of his judicial life,

life, that the majority of persons assembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the Law of Corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. If that be so, the argument drawn from the word "triers" being used generally, in the 33d and 46th sections, will not stand much in our way: because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing then in the general rule of law to prevent this finding from being held good. But the question is still open, whether on the construction of this particular statute, it does not appear that not only all the persons must be assembled, but that every one of them should concur, or at least that one of each class should concur. There was something very plausible in that last argument, but I am now clearly satisfied, either that all must concur, or that a majority may decide for the whole. There is nothing in the act which necessarily leads to a construction, that the majority must be composed in any particular manner. With regard to the general question, it has been argued most weightily, that as the leather might be seized in all the stages of the manufacture, it was right that the authority which was to determine should be delegated to persons of all the different trades, in order that the body might be aided and assisted by the united experience of all the branches, whenever the inquiry should come before them. But it struck me that when the body was so constituted and had assembled, and could have the assistance of the united experience of all, the necessity of all concurring in the final judgment was not so apparent, and might be attended with inconvenience. It is indeed a truth, that in a body composed of three classes of trade, those who are of the particular trade of which the owner of the goods happens to be, may feel an inclination to favour the members of their own trade, and may hesitate to condemn, when they themselves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, since the searchers are obliged to execute a public duty, and the validity of their acts must depend upon the judgment of the triers (*a*). It seems better that when all the knowledge which each class can afford has been communicated, the

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(a) *Warre v. Farley*, 6 Term. Rep. 443.

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whole should be governed by the majority. This case has been compared to the case of juries, and in many respects it is analogous; but in an abundance of particulars it is unlike. On the abstract question it has often been debated, whether there is policy and good reason on the side of the rule which requires unanimity in a jury. However good therefore the rule may be found in practice when applied to juries, yet if it be doubtful in theory we ought not to force the analogy, and apply the rule to other cases where it may be found inconvenient. It is impossible that bodies of men should always be brought to think alike: there is often a degree of coercion, and the majority is governed by the minority, and *vice versa*, according to the strength of opinions, tempers, prejudices, and even interests. We shall not therefore think ourselves bound in this case by the rule which holds in that. I lay no great stress on the clause of the act which appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial: it relates only to the assembling the searchers; now there is no doubt that all the six triers must assemble; and the only question is, what they must do when assembled? We have no light to direct us in this part, except the argument from the nature of the subject. The leather being subject to seizure in every stage of the manufacture, the tribunal ought to be composed of persons skilful in every branch of the manufacture. And I cannot say there is no weight in the argument, drawn from the necessity of persons concurring in the judgment, who are possessed of different branches of knowledge, but standing alone it is not so conclusive as to oblige us to break through a general rule: besides, it is very much obviated by this consideration, that when all have assembled and communicated to each other the necessary information, it is fitter the majority should decide than that all should be pressed to a concurrence. If this be so, then the reasons drawn from the act, and which have been supposed to demand, that the whole body should unite in the judgment, have no sufficient avail, and consequently the general rule of law will take place; *viz.* that the judgment of four out of six being the whole body to whom the authority is delegated regularly assembled and acting, is the judgment of all.

BULLER J. The first question to be considered in this case is, what is the legal effect and understanding of the facts disclosed upon this record, and I think this point has been extremely well argued

argued by my Brother *Adair*, whose argument, together with the authorities which he has cited, has convinced my mind, that fitting here, we must pronounce this to be the finding of all the six triers.

This is a case in which six persons are united together as one body, and are required by the act to form an opinion. They are not permitted to say we will form no opinion, but they must decide whether the leather be sufficient and serviceable or not. Four of them expressly decide that it is not; the other two do not agree in that finding, but they do not dissent: and I take it that in such a case, where the law compels persons convened under an oath to form an opinion, if any of them do not pronounce against the opinion of the majority, they find for it. If that be so, it puts an end to this case; for if it is to be understood, upon this record, that this judgment has the effect of a judgment of the six triers, no question remains to be considered.

But upon the act two questions arise: 1st, Whether all the six triers must concur in their judgment, or whether a majority are sufficient to decide? 2dly, If a majority can decide, what that majority must consist of? Now it seems to me, that upon the first question the authority of *Co. Litt. 181. b.* if we went no further, is decisive; because it is there said in express terms, that in matters of public concern the voice of the majority shall govern. It is to be remembered, that not a single case, nor a dictum has been quoted on the other side of the question, and that this stands wholly uncontradicted. In the next place, I think there is great weight in some of the cases which have been mentioned, and that the conclusion to be deduced from them goes much further than has been admitted. *Wittnell v. Gartham* was said to have been decided upon three different grounds: 1st, Upon the founders intent; 2dly, On a resemblance to the case of corporations; and 3dly, Upon usage. One thing is clear from this authority, that a deed which speaks in general terms, giving a power to a certain number of persons, does not necessarily import that all these persons shall concur, because if that were necessarily the legal construction of the deed, usage would be laid out of the question. Then we have got thus far upon this case, that a deed which gives a power to a certain number of persons may admit of two constructions; either that all must join in the act, or that the majority may do it; in no other way could usage be admitted; usage being admitted, it certainly had its effect in that case. The case therefore is open to the argument of inconvenience, which was slightly touched upon:

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for if the act admits of two constructions, certainly the argument of inconvenience applies. Now if it be necessary that all should concur, one man may destroy the determination of five, though that one may be the least qualified of the whole six to judge; and the consequence will be, that if the defect be in the tanning of the leather, and by the tanners and the cordwainers opinions it be pronounced insufficient, yet if one currier declare it to be sufficient, the judgment of the others will not avail. Why, that is unreasonable upon the face of it, and therefore such a construction cannot be adopted. It seems to me therefore upon the whole view of the case, that the majority of the six must decide. With respect to that majority being composed in any particular way, I can see nothing in the statute which warrants such an idea.

HEATH J. I am of the same opinion, and as the case has been so fully entered into, I shall very shortly deliver the reasons on which my opinion is founded. In the first place, a question has been made whether or no a power requiring in the exercise of it skill and discretion, being delegated to a certain number of men, ought to be exercised by all, or whether it is sufficient that it should be exercised by the majority of them? I do not think that either of the three cases cited at the bar, either the case out of *Atkyns*, or the two cases out of the *Term Reports*, directly go to prove the proposition contended for by the Plaintiffs; because those decisions might have been maintained upon other grounds, for I observe that in all the three cases the powers in question were new powers delegated to bodies of men, in which by several statutes and the common law the acts of the majority conclude the minority; it might therefore be considered that the new power ought to be exercised exactly in the same way as the old power would be. However, we find some dicta of very great respectability, viz. of Lord *Hardwicke*, and the Judges who presided in the *King's Bench*, to shew that as well upon common law and common reason as upon the particular circumstances of the cases before them, the act of the majority concluded the minority. Then the question has been argued upon the different clauses of the statute, and it seems to me, that a very good answer has been given to these clauses. All must concur in trying, and then though they be of different opinions, some of one opinion, some of another, yet all having tried, the majority shall bind.

Though

Though we have no particular decisions directly in point, yet there are some usages and some received opinions which are equivalent to decisions.—We know very well that in all commissions of oyer and terminer and gaol delivery, and of the peace, where a quorum is constituted, and it is necessary that a quorum should be present to do the acts for which they are appointed, yet if the quorum are in the minority, the majority shall conclude the minority. For these reasons I concur in opinion with his Lordship and my Brother.

ROOKE J. I might rest satisfied with deciding on the particular circumstances of this case, and if I did, I should agree, that after the authority of the *King v. Foxcroft*, four having absolutely concurred in this case, and the two others having only refused to concur, will amount to a finding by the whole body. But as that might lay a ground for further litigation, I think it right to be more explicit. I think the words of the statute are at least doubtful, and I am warranted in so thinking since the counsel have not confined themselves to contending that the whole body must concur, but either the whole body or one of each class. The latter construction seems extremely questionable, since the act makes no mention of the three classes which in s. 24. appoints triers for the country, though they are to examine and try in the same way as those in London. The authority given to the triers in the present instance is general to examine and try whether certain goods are serviceable or not, and is committed to them for the advancement of public justice, and as a public trust. Now the decisions are numerous (and may be found in *Viner*, title *Authority*, letter B) to shew that a different construction prevails with respect to private authorities and authorities for the advancement of public justice. So also *Lambard* in his *Justice of the Peace* states expressly that where a precept for keeping the peace is made jointly to twain, one alone may serve and execute that precept; following the rule laid down in *Co. Litt. 181. b.* If this be the case and we are not bound by the strict words of the act, (which it seems agreed we are not,) but are to give the clauses such a construction as will best advance the ends of public justice, there can be very little doubt how we ought to decide. We shall not advance public justice by saying that though a majority of the triers who have had the advantage of all the information to be derived from the whole six who compose the tribunal, are of opinion that the leather is un-serviceable, still any one man shall have it in his power to prevent

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a finding by holding out against the rest. All six must undoubtedly try; but it does not therefore follow that they must all decide the same way. Each man is after due examination and inquiry to decide according to the best of his judgment, and the question is to be determined by the opinion of the majority.

Judgment for the Defendants.

May 11th.

DA COSTA v. DAVIS.

If the condition of a bond be to render a person in execution who has once been discharged, it is void. Condition to do one of two things; one becomes impossible, no reason for not performing the other.

DEBT on bond for 1460*l.* dated 20th *July 1797*, and given by the Defendant and one *J. G. Kohn* to the Plaintiff to procure the release of one *Edward May*, who was in execution at the suit of the Plaintiff. The condition was that if the obligors or the said *Edward May* should pay to the Plaintiff 730*l.* and interest, on or before 10th *January 1798*; or if default should be made in such payment, then if the obligors should, on the 12th *January 1798*, surrender the said *Edward May* to the Plaintiff, at the house of one *Thomas Wright*, between the hours of twelve and two, so that he might be again taken in execution, the bond should be void.

Plea. That before and at the time of making the bond, *May* was a prisoner in the *Fleet*, charged in execution at the suit of the Plaintiff and several others: that a little before the making of the bond, *May* requested the Plaintiff to discharge him from the said execution at his suit, and offered the bond in question as a security for his debt to the Plaintiff; which bond was accordingly given, and *May* was discharged from the execution at the Plaintiff's suit; but that the other creditors having refused to discharge him, he continued a prisoner, whereby the obligors were prevented from surrendering him at the time and place in the condition mentioned; that the obligors, before the day, gave notice to the Plaintiff that they could not surrender *May* according to the condition, but that *May* was then in the *Fleet*, and would be there on the 12th *January*, between twelve and two, and that the obligors would then and there render the said *May*, so that he might be again taken in execution; and that the obligors on the 12th *January* were in the *Fleet*, and attended there between twelve and two, and then and there had the body of the said *May*, and were ready to surrender and deliver him up to the Plaintiff, so that he might be again charged in execution, but that neither

neither the Plaintiff or any person on his behalf was there to receive him. And this, &c. wherefore, &c.

General demurrer and joinder.

Le Blanc Serjt. for the Plaintiff contended, that no legal excuse for non-performance of the condition was shewn by the plea.

Williams Serjt. contra insisted, that the condition to surrender had been substantially performed, and cited *Freshwater v. Eaton*, 1 Str. 49. where the condition of the recognizance was to surrender the principal to the keeper of the Palace court; a writ of error in the King's Bench having been brought, and the judgment below affirmed, a surrender to the Marshal of the *Marshalsea* was held a good performance of the condition of the recognizance.

The Court was of opinion on the authority of *Vigers v. Aldrich*, 4 Burr. 2482. that the first part of the condition was void, being to render a prisoner in execution who had been once discharged, and therefore as the other part had not been performed, the bond was forfeited. Besides that where the condition of a bond is to do one of two things, shewing that one could not (a) be performed, is no good reason for not having performed the other.

Judgment for the Plaintiff.

(a) Unless it become impossible by the act or by the Act of God. *Laughter's Case*.
of the obligee. *Com. Dig. Condition* (K. 2). 5 Co. 21 B.

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WHITELOCK Administrator, &c. and Others v. HEDDON May 18th.
and Others.

Pof. 559.

THIS was a case sent under the direction of the Lord Chancellor for the opinion of the Judges of this court, which stated: that *Thomas Whitelock* (the testator) being seized of a leasehold estate for three lives, under the Archbishop of York, and a small freehold estate, made his will the 31st August 1778, by which after giving to his son *John Whitelock* an annuity of 20*l.* for life, charged on his freehold, leasehold, and fountainhold estates at *Monckton Mains* and *Balderby* in the county of York, and also a further annuity of 20*l.* for life, after the death of *Mrs. E. Beckwith* charged on the same estates, and also an

Testator devised "all his freehold, leasehold, &c. estates" to A. in fee, provided that if B. shall have "any son or sons," then "to such male issue as B. shall have when A. attains twenty-one," but A. to have the rents and profits of the

estates till he attains twenty-one; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to A. his heirs, &c. for ever;" B. had one son who died before A. attained twenty-one, and a second who was born three weeks after that period; held that the first son took nothing, but that the second took an estate in tail male.

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annuity of 10*l.* for life to his daughter *E. Heddon* wife of *W. Heddon* of *Balderby*, Yeoman, charged on the same estates, and for her separate use; he devised as follows: " Item I give " devise and bequeath unto my grandson *John Heddon* son of " *W. Heddon* of *Balderby* aforesaid Yeoman all my freehold " leasehold fountainhold lands tenements hereditaments and " estates whatsoever to him his heirs and assigns for ever, save " and except as hereinafter mentioned, that is to say, provided " that in case my said son *John Whitelock* shall have any son " or sons begotten and born in lawful matrimony then I give " devise and bequeath all my said freehold leasehold fountain- " hold lands tenements hereditaments and estates whatsoever " hereinbefore given and devised to my grandson *John Heddon* " to such male issue as my said son *John Whitelock* shall or may " have at the time of my said grandson *John Heddon* attaining " the age of twenty-one years, but I will order and direct that " in case my said son *John Whitelock* shall have any male issue " then I order and direct that the said *John Heddon* shall re- " ceive the rents and profits of my said freehold leasehold " fountainhold lands tenements hereditaments and estates what- " soever until he shall attain the said age of twenty-one years " as above mentioned." He next proceeded to give several legacies to his grandchildren, the *Heddons*, to some of his friends, and to the poor of *Bishop Monkton* in the county of York, and then devised thus: " Item as to all the rest and residue of " my real and personal estates of what nature or kind soever " not hereinbefore disposed of I give devise and bequeath the " same to my grandson *John Heddon* his heirs executors ad- " ministrators and assigns for ever." *Thomas Whitelock* the testator died 28th December 1780, leaving *John Whitelock* his only son and heir at law. The devised estates were taken pos- session of for the use of *John Heddon* the first devisee, till he at- tained the age of twenty-one years, and when that period arrived, viz. 21st May 1792, he entered on those estates. After the death of *Thomas Whitelock* the testator, and before *John Heddon* at- tained the age of twenty-one, *John Whitelock* had a son born named *John*, who died when five weeks old, and before *John Heddon* attained twenty-one. At the time of *John Heddon* attaining the age of twenty-one, the wife of *John Whitelock* was *enfient* with a child which was born 3d August 1792, being something less than three months after *John Heddon* attai

ing the age of twenty-one. This child was christened *Thomas*, and died 24th January 1795.

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The question for the opinion of the Court was, Whether the above-named *John Whitelock* the first son of the Plaintiff *John Whitelock*, or the said *Thomas Whitelock* the second son of the said Plaintiff *John Whitelock*, or either of them, were or was entitled to any and what estate under the will of the said *Thomas Whitelock* their grandfather in the estates thereby devised?

Le Blanc Serjt. for the Plaintiff. The words of the will, "at the time of my said grandson *John Heddon* attaining the age of twenty-one years" are not descriptive of the persons who are to take, but only of the time at which they are to take. If this be true, then an interest vested in the eldest infant *John Whitelock* as soon as he was born. At any rate however the second son *T. Whitelock*, who was in *ventre sa mere* at the time of *John Heddon's* attaining his age of twenty-one, comes within the description of the above words. *Doe d. Clarke v. Clarke*, 2 H. Bl. 399. *Doe d. Lancashire v. Lancashire*, 5 T.R. 49. *Miller v. Turner*, 1 Vez. 85. (a) (the Court said that point need not be contended, as it was now fully settled). However it is immaterial which of the sons did take; I only contend that if either took, the estate given was a fee. The testator devised all his estates to his grandson by his daughter, but foreseeing that his son might have a son, he meant to substitute that son, if any such there should be, in the place of the first devisee, who was then living. Now if the son of the son shall not be held to have taken a fee, they will have a less estate than the son of the daughter. Besides a devise "of all my estate or estates" will carry a fee unless the Court sees words to narrow the construction. As to the supposed words of limitation which are superadded; "male issue" may be construed either as words of purchase or limitation, according to the intent of the testator, and the residuary clause may have been dictated by unnecessary caution. Though the Plaintiffs will only be entitled to the freehold on the idea that either *John* or *Thomas Whitelock* took a fee, since nothing has been done to bar the remainders, yet if an estate-tail in the freehold passed either to *John* or *Thomas Whitelock*, the leasehold will have vested absolutely in them, and the Plaintiffs will be entitled to that part of the estate; unless indeed the nature of the tenure under the Archbishop of York may make a difference. If "male issue of *John Whitelock*"

(a) *Long v. Blackall and others*, 7 Term Rep. 100.

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be construed to mean all male descendants of *John Whitelock*, so long as there shall be any, then the first and other sons must take successively as tenants in tail male, or all the sons must take as joint-tenants with several inheritances in tail male.

Shepherd Serjt. for the Defendants. *John Whitelock* took only an estate for life. The express words of the will give to *John Heddon* an estate in fee; and when the testator uses the same words of description in the provisional devise to the son of *John Whitelock*, which he employed in the devise to *John Heddon*, he only meant to denote the premises, and not the quantity of the estate. If it should be held that the son of *John Whitelock* was intended to take a fee, then the residuary clause must be rejected altogether as having nothing to operate upon. There is no case where the word "estate" or "estates" has been held to give a fee, unless accompanied by other expressions demonstrative of such an intention. In *Denn d. Moore v. Mellor*, 5 T.R. 563, it was held that the word "hereditaments" would not give a fee, and an expression of Mr. J. Buller, which was thought to convey a contrary opinion, was there commented upon. But it has been contended that the sons of *John Whitelock* by force of the words "male issue" were to take an estate-tail. Those words are only synonymous to "son or sons" before used, and though such a construction will give a better estate to the children of the daughter than to those of the son, yet that appears to have been the testator's intention; 1st, From the circumstance of his having given to *John Heddon* the rents and profits at all events, till he attained the age of twenty-one; and 2dly, From his having made him residuary devisee.

EYRE Ch. J. I apprehend that upon the question submitted to us we shall have no difficulty in saying that *John Whitelock* the first son took no estate at all. I cannot read the will in the way which has been suggested by my Brother *Le Blanc*, in order to give him a vested interest, before *John Heddon* attained the age of twenty-one: because I see nothing in the will which affords any sufficient ground for such a construction. Indeed that which is to be collected from the words of the will, warrants a contrary inference, the testator having declared that *John Heddon* should have the rents and profits until he should attain the age of twenty-one. With regard to the estate which *Thomas Whitelock* took, if it had been asked of the testator when he was making the disposition in question, what interest he meant that such a son being in

ventre

entre sa mere at time of *John Heddon* attaining the age of twenty-one, should have, I think it very probable that he would have said, that such a son should take an estate in fee; and probably he would not have thought of the limitation over. This question however has not been asked of the testator, and it is but conjecture what answer he would have made if it had been asked; we therefore must consider what he has said, and must put a reasonable construction on his words, with reference, where they are capable of different constructions, to the rest of the will. He has said clearly, that he meant to give an estate in fee-simple to his grandson *John Heddon*; but that if his son *John Whitelock* should have a son or sons, then he meant to give a benefit to such of them as should be living at the time when *John Heddon* should attain the age of twenty-one. It is most evident that he meant all the sons of *John Whitelock* who should be living at the time when *John Heddon* should come of age, to have a benefit of some kind or other: And the words "such male issue" must be construed to be so far synonymous to son or sons, as that in some manner they should all partake of this benefit. Now there are but two ways in which this can be effected, either by their taking as joint-tenants, or in succession in tail male. In the strict acceptation of the words "such male issue," taken with reference to the words "son or sons" before used, they mean no more than son or sons; but when I consider that these sons were the sons of his own son, who it appears were to have the benefit of his bounty in preference to the son of his daughter, and that this word "issue" is a collective term, capable of being descriptive either of person or interest, or both, I think it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate in tail male to the sons of *John Whitelock*, as many as there should be in order of succession. This is what the words will bear. As to the argument, that a fee is conveyed to the sons of *John Whitelock* by the word "estates," I take the rule to be, that it may convey a fee if the Court sees, on the whole context of the will, that the testator intended that it should do so; but that, in its strict technical sense, it does not convey a fee. I apprehend therefore that we shall certify, that *Thomas Whitelock* took an estate-tail in the freehold.

BULLER J. The first question here will be on the sense of the word "estate" as used in this will. There are many cases in which this word has received different interpretations. *Noscitur a sociis.* Look to the words which accompany and are connected with it.

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What I said in a former case with respect to the word "hereditaments" has been mis-stated. I never said that it would in all cases carry a fee; but that, accompanied with other words, it might carry a fee. Lord Kenyon thought it never could, and that was the only point in which we differed. Now if the word "estate" will not pass a fee in this case, the whole dispute with respect to the freehold is at an end; for whether *Thomas Whitelock* took an estate-tail, or for life, will make no difference; though I concur in opinion with my Lord, that the words used will give an estate in tail male.

HEATH J. I am of the same opinion. The word "estate" must be taken according to the context. There is a case in *Eq. Cas. Abr. (a)* where a man having devised the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods whereof he was possessed, the word "estates" was confined to personal estate, being coupled with chattels. It may give an estate for life, in tail, or in fee, according as the intention of the testator appears. Here I think it carried a fee-tail, from the manifest intent of the testator to prefer the line of the son to that of the daughter.

ROOKE J. I am of the same opinion. The word "estate" or "estates" may or may not give a fee-simple, according to the context. There is no expression in this will to shew, that it was the testator's intention to describe, by the word "estates," the quantity of interest which was to pass, but only the premises; and I think it does appear that he meant to give an estate-tail, it having been his manifest intention to give an inheritance to the son of his son, in preference to the grandson by his daughter.

In *Trinity Term*, the following certificate was sent to the Lord Chancellor.

We are of opinion, that *John Whitelock*, the first son of the Plaintiff *John Whitelock*, was not entitled to any estate under the will of *Thomas Whitelock* his grandfather: and that *Thomas Whitelock*, the second son, took an estate in tail male in the estates which the testator held in fee-simple: and that, in respect to the leasehold estates for lives, he and his heirs male took as special occupants during the lives of the *cestui que vies*.

JAS. EYRE.

F. BULLER.

J. HEATH.

G. ROOKE.

(a) 1 vol. p. 178. *Wilkinson v. Merryland, Cro. Car. 447.*

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*May 14th.**2 East. Rep.*
359.

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THE Plaintiff having declared in debt for a sum certain, for work and labour done, goods sold and delivered, money had and received, and on an account stated, " which the Defendant had agreed to pay ;" the Defendant let judgment go by default, and sued out a writ of error, but did not put in bail in error. The Plaintiff then proceeded against the bail to the action; and *Shepherd Serjt.* having obtained a rule to shew cause why the proceedings against them should not be stayed pending the writ of error,

Le Blanc Serjt. shewed cause, and contended, that as the declaration stated an agreement to pay a sum certain, the Defendant by letting judgment go by default, had admitted that agreement, and was therefore bound to put in bail in error by 3 Jac. 1. c. 8.

Shepherd contrà cited *Girling v. Baker*, Yelv. 227.; *Bidleston v. Whytel*, 3 Burr. 1545.; and *Trinder v. Watson*, 3 Burr. 1566.; and insisted that the form of action was not sufficient to bring a case within the statute, which ought to be construed strictly.

EYRE Ch.J. The effect of obliging this Defendant to give bail in error will be to convert all those actions which for a century past have been actions of *assumpsit*, into actions of debt; and the same mischief will again arise which first occasioned their being turned into *assumpsit*. To bring a case within the statute of *James*, the Court must see distinctly that a specific contract has been entered into; and though I think that the statute should be construed liberally, yet it does not appear to me that, on a fair construction, this form of declaring can be considered within the meaning of it.

BULLER J. The cases seem to have gone on a wrong principle, where it has been said that the Court ought to construe the act strictly. If that be the true construction, it ought to appear that the contract is for a specific sum payable at a certain time. But I should have thought it better for the Court to say, that this act, which is a remedial law, should be construed liberally to prevent the mischief recited in the preamble: " Forasmuch as his Highness's subjects are now more commonly withholden from their just debts, and often in danger to lose the same, by means of writs of error, which are more commonly sued than heretofore they have been." — However we must not overturn the cases.

HEATH

It is not necessary to give bail in error, on a judgment in debt, unless it appears that the action was brought on a specific contract.

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HEATH J. We must adhere to the rule which has been laid down; and indeed I cannot but think that the decisions have been conformable to the intention of the Legislature, as the act in question passed soon after the determination of *Slade's case (a)*, where it was held that an action of *assumpsit* would lie in cases like the present.

ROOKE J. of the same opinion.

Rule absolute (b).

(a) 4 Co. 92. b.

(b) Vid. *Alexander v. Bift*, 7 T. R. 449.

May 14th.

Pof, 344.

Pof, 383.

2 Town 244.

The Defendant
must take advan-
tage of an irregu-
larity in the writ,
before appear-
ance.

SHEPHERD Serjt. having obtained a rule to shew cause why the proceedings in this case should not be set aside for the following irregularity in the writ, *viz.* that it was tested the 22d *May*, instead of the 22d *April*.

Cockell Serjt. shewed for cause, that the Defendant had not appeared; and therefore, not being in Court, was not competent to make the objection.

Shepherd contra insisted that the Defendant was bound to object in the first instance.

And the Court (*absente* **EYRE Ch. J.**) being clearly of that opinion, made

The rule absolute.

May 15th.

8 Term. Rep.
112. Judgment
affirmed.

Devise to the
testator's seven
sisters share and
share alike; on
the death of any
of them, her
share to go to her
sister and other
sons in tail; and
in default of such
sons, to her
daughters as
tenants in common.
In case of any of
the seven sisters
dying without issue, or such issue dying under twenty-one, the surviving sisters to take her share; and if all
the sisters should die without issue, or such issue die under twenty-one, then over. Held, that the words "in
default of such sons" did not make the remainder to the daughters contingent, which took effect notwithstanding
the birth of a son.

**DOE ex dem. GERTRUDE Baroness DACRE v. MARY
JANE ROPER Dowager Lady DACRE.**

THIS ejectment was tried before *Eyre Ch. J.* at the Sittings for
Westminster after *Easter Term 1797*; when the Jury found
a special verdict, setting forth (as far as is material to be stated)
as follows:

John Trevor being seised in fee, by will dated the 5th of *April*
1743, devised his capital mansion-house called *Glynde* in *Sussex*,
with the lands, &c. &c. and all his estates in *Sussex*, to his kinsman
Dr. R. Trevor in fee. He then gave to his sister *Mrs. Rice*,
during her life, an annuity of 300*l.*, to be paid half-yearly out of
his estates in *Middlesex*, *Denbigh*, and *Flint*; to *Elizabeth Forster*,
the seven sisters dying without issue, or such issue dying under twenty-one, the surviving sisters to take her share; and if all
the sisters should die without issue, or such issue die under twenty-one, then over. Held, that the words "in
default of such sons" did not make the remainder to the daughters contingent, which took effect notwithstanding
the birth of a son.

formerly

formerly his nurse, an annuity of 50*l.* for her life charged on the same estates; to his nephew *George Rice* and his niece *Lucy Rice*, children of his sister Mrs. *Rice*, a legacy of 1000*l.* each; and to his cousin *Robert Trevor*, brother of Dr. *Richard Trevor*, a like legacy of 1000*l.* charged in default of his personal estate upon his said estates in *Middlesex*, *Denbigh*, and *Flint*. He then devised " all his manors, messuages, tithes, lands, tenements, and here- " ditaments lying and being in the said counties of *Middlesex*, " *Denbigh*, and *Flint*, or elsewhere not before disposed of, sub- " ject to the charges before mentioned, unto and amongst his " dear sisters *Grace Trevor*, *Mary Trevor*, *Ann* the wife of the " Honourable *G. Boscarwen*, *Margaret Trevor*, *Ruth Trevor*, " *Gertrude Trevor*, and *Arrabella Trevor*, during their natural " lives respectively share and share alike, and from and after the " decease of any of them, then the part or share of her or them " so dying, to go to the first and other sons of such of them so " dying, and the heirs of his and their bodies successively, and " in default of such sons then to and amongst the daughters of " his said sisters so dying as tenants in common, and not as " joint-tenants and the heirs of their respective bodies issuing, " but in case any of his said seven sisters last-mentioned should " die, without leaving any issue of her body begotten, or that " such issue should die before he or she should attain his or her " age of twenty-one years, and without issue, then he gave her " share to and amongst the survivors or survivor of his said " seven sisters and their issue, to go and descend in like manner " as before is mentioned as to the shares, parts, or proportions " before given to them respectively." Then having given the " overplus of his personal estate, plate, and jewels, after debts and " legacies paid, to be divided amongst his said seven sisters, he pro- " ceeded thus: " And I do further will and appoint that in case all " my said seven sisters shall happen to die without issue, or leaving " issue, such issue shall all die before he, she, or they shall attain the " age of twenty-one years and without issue, that then my said " estate in *Middlesex* and *Wales* (subject as aforesaid) shall go to " and be enjoyed by such person or persons who shall then be " entitled to my estate in *Sussex* hereinbefore devised."

The testator died the 9th September 1743. On the 27th of July 1744, *Gertrude Trevor*, one of the seven sisters, married the Honourable *Charles Roper*, and had issue two sons, *Trevor Charles Roper* (afterwards Baron *Dacre*) and *Henry Roper* (whodied), and also a daughter *Gertrude* (now Baroness *Dacre*, and lessor of the Plaintiff).

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Plaintiff). The Honourable *Charles Roper* died leaving *Gertrude* a widow. *Ruth* and *Margaret*, two of the seven sisters, died without issue, whereby the other five sisters became each seized for life of one-fifth of these estates. On 2d of March 1773, *Trevor Charles Roper* the son of *Gertrude*, one of the seven sisters, married *Mary Jane Fludyer*, and previous to such marriage a recovery was suffered of the one-fifth of which his mother was seized for life, with remainder to him in tail, and the same was settled on the issue of that marriage, with remainder to his wife for life, remainder to himself in fee; which remainder passed by his will to his wife the Defendant. (So that as to that one-fifth the Plaintiff laid no claim.) Afterwards by the death of *Mary Trevor*, unmarried and without issue, in March 1780, her one-fifth became divided among her four surviving sisters *Grace*, *Ann*, *Gertrude*, and *Arrabella*, each taking thereby one-fourth of her one-fifth part. In July 1780, *Gertrude Roper* died; whereby as well her one-fifth of the whole, of which a recovery had been suffered on her son's marriage, as her one-fourth share of her sister *Mary*'s one-fifth, descended to *Trevor Charles Roper* her son. Afterwards, in 1789, *Arrabella Trevor* died unmarried; whereby her one-fifth part of the whole, and her one-fourth part of her sister *Mary*'s one-fifth, became divided among her only surviving sister *Grace*, Mr. *Boscarwen* the son of *Ann Trevor*, and *Trevor Charles Roper*, son of *Gertrude Trevor*, in thirds. By which means *Trevor Charles Roper* (then Lord *Dacre*) became seized in tail (besides the one-fifth of which the recovery had been suffered) of one-fourth of one-fifth, being his share of *Mary*'s fifth part, and of one-third of one-fifth, and one-third of one-fourth of one-fifth, being his share of *Arrabella*'s part. On the 3d of July 1794, *Trevor Charles Roper* Baron *Dacre* died without issue, leaving the Defendant the Dowager Lady *Dacre* his widow, (who was without doubt entitled to one-fifth of the whole estate, of which the recovery was suffered and settlement made previous to her marriage with him, and to whom by will he had devised the premises in question,) and the lessor of the Plaintiff the Baroness *Dacre*, his only sister.

The lessor of the Plaintiff, under the words "in default of such sons," claimed the one-fourth of one-fifth, one-third of one-fifth, and one-third of one-fourth of one-fifth of the whole estate, being the late Lord *Dacre*'s share of his aunts *Mary* and *Arrabella*'s shares, which came to him on their deaths after the recovery suffered, and of which, at the time of his death, he was seized in tail.

This

This case was twice argued, once in *Trinity Term* last by *Williams Serjt.* for the Plaintiff, and *Shepherd Serjt.* for the Defendant, and again in this Term by *Le Blanc Serjt.* for the former, and *Cockell Serjt.* for the latter.

Arguments for the Plaintiff. It will be contended on the other side, that as the words "in default of such sons" introduce the limitation to the daughters, that limitation is contingent, and the contingency having happened by the birth of a son, all the subsequent remainders are destroyed. But those words do not create a contingency, being only a continuation of the preceding limitation to the sons, and mean the same as if the testator had said "on failure of the preceding limitation." This construction is warranted by the general intent of the testator appearing on the face of the will. The survivorship between the seven sisters being to take place only in case of the death of any of them without leaving any issue of their bodies begotten, or the death of such issue before he or she shall attain the age of twenty-one and without issue, shews that the testator had it in contemplation, that all the issue of his seven sisters, both male and female, would take, independent of any contingency; and the limitation to Dr. *Trevor*, being to take place only in case there should be no issue of any of the sisters, proves the same intent. Moreover the testator by his will has excluded his sister *Rice*; but if the words in question should be held to make the remainders over contingent, the cross-remainders to the sisters, and the reversion to Dr. *Trevor*, would be put an end to by the birth of a son of any one of the seven sisters, and the excluded sister would take with the others as co-heiress. Indeed the very situation of these words, placed as they are between the two limitations, shews that they were intended to connect them, and to give to the daughters on failure of issue male. The Court will do in this case what they have usually done, namely, construe the subsequent words by the preceding limitation, *Tuck v. Frencham*, *Moore* 13. *Dyer* 171. *Anderson* 8. *Co. Litt.* 21. *a.* note 126. ed. 15. *Claxton v. Glazier*, cited by *Mead J. Moore* 124. and in *Cro. Eliz.* 16. by the name of *Glover* and *Clatche's* case. Now the preceding limitation being to the sons in tail general, the subsequent words, "in default of such sons," may be read, "in default of the preceding limitation." Where a testator in creating a remainder has used shortness or incorrectness of expression, the Court will not on that account construe the remainder to be contingent. *Nicholas Lee's* case,

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case, 1 *Leon.* 285. 3 *Leon.* 106. *Holcroft's case*, *Moore* 486 and 520. *Holt v. Burley*, 2 *Vern.* 651. Besides there are many cases in which the Court has even added words with a view to effectuate the apparent intention of the testator. *Spalding v. Spalding*, *Cro. Car.* 185. *Evans v. Astley*, 3 *Burr.* 1570. *White v. Barber*, 5 *Burr.* 2703. *Ambl.* 701. The word "default," in law, means failure, whether there have been sons, and such sons have died, or whether there have been any sons. Thus if issue die without leaving issue, they are said to have died without issue. In a formeden the writ always supposes the donee to have died without issue, and it is no variance if it appear that there has been issue, and that issue has since failed. There is however one case in modern times which seems to militate against the lessor of the Plaintiff, namely, *Keene (a)*

ex

6 *Eas.* 342.

(a) A note of that case to the following effect was read by Mr. Justice *Buller*, in his judgment. *Keene ex dem. Pinnock & ux. v. Dickson*, *B. R. M.* 23 *Geo.* 3.

In ejectment between these parties, tried before Lord *Mansfield* at the *Guildhall* Sittings after Easter Term 1783, a special verdict was found, stating (as far as is material) as follows:

Henry Dakins, being seized in fee of the premises in question, on the 5th Aug. 1747, devised the same to his brother *P. D.* for life, and after his decease to his niece *Grace Pinnock* for life; then to trustees to preserve contingent remainders, and after the decease of *P. D.* and *Grace Pinnock* "in trust, and to and for the use and behoof of the first son of his niece *Grace Pinnock*, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, and for want of such issue to the second, third, fourth, fifth, and sixth, and all and every other the son and sons on the body of his said niece to be begotten, and the heirs of the body of such son and sons lawfully issuing; according to the seniority of age and priority of birth, the elder and the heirs of his body to be always preferred and take place before the younger and the heirs of his body, and for want of such issue male then to the use and behoof of all and every the daughter and daughters of his said niece *Grace Pinnock* thereafter to be begotten; and for default of such issue then to the use and behoof of *Richard Corbin*, and the heirs of his body lawfully to be begotten; and for default of such issue to the use and behoof of the second son of *Gawin Corbin* deceased, and the heirs of his body to be begotten for ever." Provided that *R. Corbin*, and the second son of *G. Corbin*, and the heirs of their re-

spective bodies, in whom the estates should become vested, should take the testator's name. *Henry Dakins* the testator died 1st October 1748, leaving his brother *P. D.* and *Grace* the wife of one *Philip Pinnock*, his niece and heir at law. *P. D.* entered, and on 1st May 1749 died; after whose decease *Philip Pinnock* and *Grace* his wife became seized. *Philip Pinnock* and *Grace* his wife had issue one son, *Dakins Pinnock*, who was born after the death of the testator and died an infant, and three daughters, namely *Elizabeth*, born in the lifetime of the testator, and *Mary* and *Grace*, born after the decease of the testator. *Dakins Pinnock* the son, and *Elizabeth* the daughter, died without issue in the lifetime of *Philip* and *Grace Pinnock*; *Grace Pinnock*, the mother, died 1st August 1769, leaving *Mary* and *Grace*: *Philip Pinnock* died 1st March 1778. *Mary*, on 1st June 1774, married *James Dickson*, and died in the lifetime of *Philip Pinnock*, her father, leaving *Mary*, the Defendant, her only daughter and heir at law. *Grace Pinnock*, the only surviving daughter of *Philip* and *Grace*, intermarried with *George Pinnock* the lessor of the Plaintiff. *Grace Pinnock* the lessor of the Plaintiff and *Mary* the Defendant are co-heiresses at law to the testator.

The case was first argued by *Graham* for the Plaintiff, and *Wilson* for the Defendant; after which Lord *Mansfield* desired that it might stand for a second argument, and that the remainder-man might be heard; accordingly it was again argued by the Solicitor General for the Plaintiff, *Pigott* for the Defendant, and *Bower* for the Remainder-man. For the Plaintiff it was contended, that the daughters took only estates for life, or that if any thing more

was

ex dem. Pinnock v. Dickson, K.B. Mich. 1783. The words used in that case do not indeed materially vary from those now in question. But it is to be observed, that it was the interest of both parties in that case to glance at the words "want of such issue male," because a vested remainder would have defeated the estate of both. Lord Mansfield saw that the remainder-man was interested, and ordered that he should be heard; but his case was never fully argued, no authorities were cited, nor was the Court reminded of any arguments from the tenor of the will. Besides, as the reason for putting a strict construction upon the words "want of such issue male," in that case, was in order to give effect to the manifest intention of the testator, the Court may consider that case as an authority for construing similar words according to the intent of the testator in this case.

Arguments on the part of the Defendant. The remainder over to the daughters is only a contingent devise, in the event of there being no son; and the birth of a son rendered such remainder void. It has been contended, that if this construction should prevail, the cross-remainders and ultimate limitation will be defeated; but as they are made to depend on an uncertain event, no argument can be drawn from them. No case has been cited to shew, that the words "default" and "want" are synonymous; and the extensiveness of the word "issue," with which they have been connected, is the reason why the cases, in which either of them have been used, have been decided in the same way. If the words "in default of such sons," shall be held to mean, "if such sons be not born, or, if born, when they die," the estate-tail, before

was necessary to satisfy the intention of the testator, they took joint estates for life, with remainders in tail to their children: for the Defendant it was insisted, that the daughters took an estate-tail: and for the Remainder-man, that on the birth of a son, the estate-tail vested in him, and then the remainder over vested also.

Lord MANSFIELD. No case exactly the same as this has ever been decided, or perhaps ever will be; but the case of (*1 Brierley v. Page*, which occurred last week, was very like it. In my private opinion I think that the whole was a blunder; but that conjecture is not a foundation for a judicial determination. We cannot supply a limitation to the issue of the daughters, for the words are express. The estate is given to the sons and the heirs of their bodies ge-

nerally, and "for want of such issue male," (which must mean sons,) over. If therefore the estate is to go over for want of sons, the contingency on which the daughters were to take has not happened, for there was a son who took, so no want of sons, and the event in which the daughters were not to take has happened. I am satisfied with this construction, because it effectuates the intention of the testator, as the daughters will take in fee.

WILLES J. On such an embarrassed will it is difficult to find out a right construction. It is clear that the line of *Corbin* was not to take until after a general failure of issue of the *Pinnocks*. The estate to the daughters is a joint-tenancy. *Ca. Lits. 182. Cook v. Cook*, 2 Vern. 545.

Judgment for the Plaintiff for one moiety, and for the Defendant for the other moiety.

given

(1) *Vid. p. 56, p. 261.*

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given to the sons, will be restrained to an estate for life; since, in the event of the sons dying, the daughters would have a right to take. The Plaintiff therefore must insist, that the words "default of such sons," mean "default of such issue;" which will hardly be assented to by the Court. All that was decided, in *Tuck v. Frensham*, was, that the testator intended to use the word "heirs" in the same sense in both clauses of the will. The same observation applies to the case in the margin of *Dyer*. In *Ives v. Legge*, 3 T.R. 488, in the note, where the remainder over was held to be vested, the words were large enough to comprehend the issue of the children, which the word "sons" is not. Even the word "issue" has been restrained to "children." *Doe v. Perryn*, 3 T.R. 484. The interest of the remainder-man in *Keene v. Dixot* was taken into consideration; for Lord Mansfield desired that he should be heard by his counsel, and considered it in his opinion, though he clearly thought that the words "for want of such issue male" created a contingency. Mr. J. Buller, alluding to that case in *Doe v. Perryn*, 3 T.R. 495, seems to have thought that the principal point decided.

EYRE Ch. J. I think that we do not want the authority of cases at this time of day to establish the rule of law on which we are to proceed to be this: that, in the construction of a will, whether the words used be technical or not technical, or even of vulgar and common parlance, the Court is to put that sense upon them, in which, on a fair consideration of the whole context, they collect that the testator intended to use them. In this case, the words on which the difficulty arises are by no means technical; they may import many things, according to the subject-matter; and we are to inquire in what sense the testator meant to use them. If we can discover that, the next consideration will be, whether the words will bear that sense; or whether we are tied down by any rule of law to understand them in any other; though indeed I can hardly put such a case. Taking a general view of the whole will, the intent of this testator appears to me to be obvious. He meant to make provision for each of his seven sisters and their children; and he meant, that if either of his sisters or her children should fail within a given time, that there should be a survivorship in favour of the other sisters and their children: and he also intended, that if neither of his sisters should have children, or if the children should all die under twenty-one and without issue, another branch of his family should take. In some event or other, he meant, not only that

that the sons should take an estate-tail, but also that the daughters should take such an estate, failing the sons. Then let us consider in what sense the testator supposed that he had used the words which constitute the limitation to the daughters. Immediately after the disposition to the daughters, he says, "In case any of my said seven sisters last mentioned shall die without leaving any issue of her body begotten, and that issue shall die before *he* or *she* shall attain *his* or *her* age of twenty-one years, then I give her share to my surviving sisters." He gives an interest to the surviving sisters in the event of one sister dying *without either son or daughter*; and expressly says therefore, that there shall be no survivorship if any of the daughters should have issue either male or female. Did he not then suppose that he had used words sufficiently strong to give an estate-tail to the daughters in the event of the sons dying *without issue*? Next comes the limitation to Dr. Trevor, which was to take place in the event of every one of the sisters dying *without either sons leaving issue, or daughters leaving issue, and such issue dying under twenty-one*. Did he not then understand, that by the original devise, and by the clause of survivorship, he had given over every share of each sister, to the sons first and their issue; and that limitation failing, to the daughters and their issue? — Would he have confined the clause of survivorship to the death of the sons and daughters of his sisters, under twenty-one and without issue, if he only meant to give a contingent limitation to the daughters in the event of no son being born? Or would he have clogged the limitation to Dr. Trevor with the existence of persons to whom he had not given any interest? The next consideration is, whether the words will bear that construction which the testator palpably intended to give them. I do not feel disposed to go all the lengths which some of the cases on wills would warrant. I am for assisting, to a reasonable extent, testators, who are not always assisted by the best advice, and whose state of mind often partakes of the state in which their bodies are; and whose advisers, if they have a little knowledge of law, frequently make a strange mixture of technical and common words. When I have got at the testator's meaning, I will, if possible, give such a construction to his words as may carry his meaning into execution; but if he has not expressed his will in such words as can bear out his meaning, then the will must take its effect according to the construction which the words will bear, and his intention will be defeated. In short, I will depart from the technical sense of words to effectuate the intention of testators as far as possible, without violating the rules of law. The words used in this case are, "in default of such sons."

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sons." It is impossible to say, without reference to the context what the meaning of these words is. I do not know a larger or looser word than "default." Abstracted from other words, what does it mean? In the expressions "judgment by default," and "a juror making default," we understand it differently. In its largest and most general sense it seems to mean, failing. It has been argued, that the birth of a son would satisfy the words, and shew that there was no default, and consequently defeat the remainder. Is there any reasonable ground for so confining the word "default," as to make the mere birth of a son destroy the contingency contrary to the plain sense of the testator, who clearly meant the default of such a son as would take the benefit of his devise; whereas a son dying in the lifetime of his mother could take nothing? By the word "default" the testator meant to denote the failure of that son at some time or other. Without referring to the context, natural death is the circumstance which he may first be supposed to have pointed at: if there should be sons and they should die, then the daughters should take. But if we look to the context, it will appear that he meant failure of those sons to whom an interest was given by the former part of the devise. (a) "Such" is a word of reference, and may be referred either to the individual person, taken abstractedly from any thing connected with him; or it is powerful enough, where the intent appears, to include every circumstance added to the description of the person in the former part of the devise. The most obvious meaning of "such son," in a provision of this nature, is, that for to whom, and to whose issue, he had given an estate in the former instance. Whatever the daughters were to take, they were to take when the provision to the sons should be spent. If there were no sons there could be no issue: there might be sons, and there might or might not be issue. A conveyancer might have thought right to add words to include every possible event: though Holcroft's case sufficiently shews that this was not necessary. But I do not intend to encumber myself with cases. Decisions upon other words something like those in question, in other wills, where the whole context of those other wills must be gone into, can afford very little assistance. The case of *Spalding v. Spalding*, which I mentioned in the course of the argument, is not in point; but the principle, that the whole context of the will must be looked into to effectuate the

(a) In *Lee's case*, 1 *Lev. 285*, where a devise was to *William*, and if he depart this world not having issue, then that the land should be sold, and *William* had a son *John*, and died, and *John* afterwards

intent of the testator, is applicable to this case. There the question was, whether a former estate, expressly given, should be defeated? here it is, whether a new limitation shall take place? Yet if we adhere strictly to the words "default of sons," it will have the effect of giving an estate-tail to the daughters, in preference to the issue of a son. That indeed would be a most violent construction, because it would disappoint an express limitation; whereas here the question depends on the construction of the particular words creating the limitation; but as applied to the apparent intent of the testator, it is equally violent and improper. I think therefore that we are bound by every rule to say, that this testator meant to use the words "in default of such sons," in the sense of "failing the limitation to the sons;" and that the daughters did take; which disposes of this question.

BULLER J. The difference which prevails between me and the rest of the Court lies in a very narrow compass. I agree that a testator may express his intention by what words he pleases, and the Court is so to expound his expressions that every word may stand if possible. The Court is to pronounce according to the apparent intent of the testator, but that intent must be found in the words of the will, and is not to be collected by conjecture *de hors* the will, or as my Lord Chief Justice expressed himself in a late case, as the question has not been asked of the testator, it is but conjecture what would have been his answer. I hold that if there are repugnant or inconsistent clauses, the Court must take the whole will and find the meaning as far as they can; but if the words are sensible, and there are none used but what *may* stand, then they *must* all so stand, and the will must be construed according to the plain meaning of those words, without any ingenious conjecture whether the testator meant more or not. In this case it has not been argued that any part of the will is inconsistent, or that every word may not stand. It has been contended that the words "in default of such sons" mean, either, if there are no sons, or if there are sons and those sons die, and that the words are capable of either of those interpretations. But I think that the testator could not mean that where the sons died the estate should go over, because I find on the face of the will that if there was a son, that son should take an estate in tail general, and consequently his issue should take after him. The words however may be construed "if there be no sons;" and where there are two constructions, one of which is sensible and

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the other not, you must take that which is sensible and reject the other. Thus stands the first argument. Then it was argued that on the authority of cases we must make the words bend to the intent. But all the cases which have been cited depend on the ground of the will being repugnant or inaccurate. Thus in *Tuck v. Frensham*, the first limitation to *heirs male*, and the subsequent remainder over in case the devisee should die without *heirs* generally, being inconsistent, it was necessary for the Court to take the whole together, in order to discover the real meaning of the devisor, and then to put a suitable construction on his words. So in the case of *White v. Barber*, the will was very inaccurate, and the Court were obliged to take a liberty with it in order to make sense. In *Spalding v. Spalding*, the devise over was inconsistent with the preceding limitation. With respect to the case of *Evans v. Aslcy*, the proviso that the devisees and their "descendants" should take the name and arms of the devisor, was inconsistent with a mere estate for life. My distinction is, that in incorrect wills the Court may take liberties, but that if the words are correct they have no power to make any alteration. In this case, as the testator has spoken plainly, it is no matter what he would have said if he had been asked. Indeed if he had been told what would become of his estate, he might have given different answers. He would not have acted unreasonably if he had said, that without any wish to continue the estate in his family for ever, he should be satisfied if in case either of his fifters should have a son, the estate were secured to him. Besides we must recollect that in great families when a son is born, very little regard is paid to the daughters. Or he might have said, "if there should be a son, he will have the power of cutting off the entail, and I will not trouble myself to make any further disposition." But whatever answer he might have given, the Court cannot alter the words of the will, and can only say *quod voluit non dixit*. Besides, if there can be a doubt, we must recollect that by the construction contended for we shall disinherit the heir at law, a circumstance which it is not usual to lay out of the consideration of the Court. The case of *Hay v. Coventry*, 3 T.R. 83. may be cited to shew that where the words of a will are such that the Court cannot help believing in their own private opinion, that it was the intention of the testator to give a fee, yet if the words used are not sufficient for that purpose, the Court cannot make any alteration. There are two other cases, however, which more immediately apply to the point in dispute.

pute. (Here Mr. Justice Buller referred to his own notes of the cases of *Denn ex dem. Briddon and Wife v. Page* and another (a), and *Keene ex dem. Pinnock and Wife v. Dickson*). In both those cases the Court was of opinion that the word "such" could only refer to that issue which had been before mentioned, *viz.* to the sons. Looking at these cases, then, I do not feel myself at liberty to reject any word of the will before us. The clauses are sensible throughout, and the plain construction of the limitation, "in default of such sons," is, that the daughters shall take in case there be no sons.

HEATH J. It seems admitted both by the Bar and the Bench, that the clear intention of a testator will control the literal con-

(a) *Denn ex dem. Briddon and Wife v. Page*, and another, *B. R. M. 23 G. 3.*

In ejectment tried at Derby, 1783, the jury found a verdict for the lessors of the Plaintiff, subject to the opinion of the Court, on a case which (as far as is material) stated, that the testatrix devised lands to *S. Neff*, son of *T. and M. Neff*, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. Neff*, and the heirs male of his and their bodies; "for default of such issue, to the use and behoof of all and every the daughter and daughters of the body of the said *T. Neff*, on the body of the said *M.* his wife begotten and to be begotten, and for default of such issue to the use and behoof of the right heirs of the said *T. Neff* for ever;" that *S. Neff* died leaving a daughter, *Mary*, one of the lessors of the Plaintiff; that *Jane*, a daughter of *T. Neff*, on the death of her brother *S. Neff*, entered into possession of the premises in question, suffered a common recovery, and conveyed to the Defendants.

The question for the Court was, whether *Jane* took an estate for life or an estate-tail?

Bulney for the lessors of the Plaintiff contended, that the words "default of such issue" could not be held to carry an estate in tail-male, and if they were construed to convey an estate in tail general, a greater estate would by that construction be given to the daughters, than had before been given to the sons.

Hill Serjt. contra insisted that the words "for default of such issue," after the limitation to the sons, could not be confined to the mere failure of sons, but extended to the failure of sons of those sons. *Wyld v. Lewis*, 1 *A&B. 432.* *Evans ex d. Brooke v. Allen*, 3 *Burr. 1570.*

Lord MANSFIELD C. h. J. This question does not admit of much argument, nor of cases to be cited, for every case must depend upon its own circumstances. The rule of law is clear, that a grant by words of purchase without further limitation enures for life only. When wills came to be in vogue, it pleased the Judges to consider them in their construction with analogy to the rule of law respecting deeds, and not with analogy to the *Roman* appointment, and therefore they held that such a grant enured for life only. There is hardly an instance where the words of a devise are restrained to a life-estate only, in which the intention of the testator is not contravened, for common men are ignorant of the difference between land and money. This being so, the Courts have been atolute to find out, if possible, from other parts of the will the intention of the testator. The question then is, whether there be enough here on the face of the will for we must not go into conjecture. I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or special. Is there then any authority for supplying the defect, and making the will anew? Had the words been "if they die without issue," an estate-tail would have been implied; but here the words are "for default of such issue," *viz.* that issue which is before mentioned. The Court has no power to strike out the word "such," and if they did, what are they to supply it with? are they to give an estate in tail general, or in tail male? There is no intention therefore apparent on the will to direct the Court.

BULLER J. of the same opinion.
Judgment for the Plaintiffs.

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struction of his words. It must be admitted that the words here express a condition on which the limitation over to the daughters of the sister shall take place: but it is easy to conjecture by what slip these words were used: and the question is, whether such a slip shall defeat the apparent intention? It has been held in cases of remote antiquity, that a limitation which in form appears to be conditional shall be construed to be absolute if most suitable to the intention of the testator. The words in *Holcroft's case* are very strong, and yet it was resolved that the devise should take effect as a limitation. So in *Andrews v. Fuller*, *Str. 1092.* which was decided in later times, the Court observed that it was no unusual thing for words of condition to be taken as words of limitation where there is a remainder over. And it was laid down as a principle in *Ives v. Legge*, *3 Term Rep. 489.* that the Courts will not construe a remainder to be contingent, where it can be taken to be vested. In *Keene ex dem. Pinnock v. Dickson*, no intention of the testator could be collected, and therefore the words were construed according to their literal meaning. Now the question here is, whether the intention of the testator cannot be collected to be, that *from and after* the death of such sons the daughters should take? This intention is strongly shewn by the different devises in the will, and the limitation over to the *Trevor* family. If the construction contended for by the Defendant should take effect, the consequence would be that the heir at law would be admitted, and the limitation over entirely defeated, and that which was the clear intention of the testator would not take place. For these reasons I am with the lessor of the Plaintiff.

ROOKE J. On looking at this will I cannot but think that the testator meant, that in case the sons and the issue of such sons should fail, the daughters should take; and that he could not intend that on the birth of a son all the subsequent limitations should be defeated. The words, "default of such sons," may either mean if there be no sons, or if there be sons, and those sons shall die. By a former part of the will an estate-tail is given to the sons. Now a subsequent provision is not to be construed to revoke a former provision, but must, if possible, receive such a construction as is consistent with it. I cannot say that the words, strictly taken, mean if there shall be no son: the expression, "default of such sons," is as vague as default of such issue, which imports on the general failure of issue; so here these words cannot be taken merely to mean if no sons shall be born

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but when sons shall fail; and this construction is consistent with the preceding limitation, and in this way all the provisions of the will may stand. But if there be any doubt on this construction, we are still warranted by the case of *Spalding v. Spalding* to insert the words "heirs of their bodies;" and though the Court might not think themselves warranted in *Keene v. Dickson* to alter the words, yet that case does not much move me, as the words were not the same as they are here: indeed I have long been tired of looking into cases on wills. I think, however, that it is not necessary to supply any words, as the expression, "default of such sons," may either apply to having sons and those sons dying, or to not having sons at all; and therefore the Court is bound to give that construction which is consistent with the other clauses of the will.

Judgment for the Plaintiff

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WEBB, one, &c. v. PRITCHETT.

May 15th.

THIS was an action by an attorney to recover the amount of a bill delivered for business done in his profession, and was tried before Lawrence J. at the last Spring assizes for Worcester.

At the trial it was insisted that the Plaintiff could not recover without producing the writ, in order to shew that a month had expired after the delivery of his bill before the action was commenced, as he had no right of action till the expiration of that month. The writ not being produced, the learned Judge nonsuited the Plaintiff, giving him leave to apply to the Court to set the nonsuit aside, and enter a verdict for the amount of his demand, 12*l.* 8*s.*, if they should think the nonsuit wrong.

Accordingly Williams Serjt. on a former day having obtained a rule nisi for that purpose,

Marshall Serjt. now shewed cause, and contended that the 2 Geo. 2. c. 23. s. 23. having enacted that an attorney shall not declare till a month after the delivery of his bill, it becomes necessary in this, as in other cases where the action is not to be brought before or after a certain day, to shew its actual commencement; he added that a King's Bench record, in which the day is stated in the memorandum, may be taken as good *prima facie* evidence at *Nisi Prius* of the time at which the action was commenced; but that as a record in this court only begins with

In an action on an attorney's bill, the *Nisi Prius* Roll is good *prima facie* evidence that the action was not commenced till the expiration of a month after delivery of the bill.

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the placita of the term, there is nothing from which the day on which the action was commenced can be inferred.

EYRE Ch.J. (stopping *Williams* Serjt.) The only question here is, whether the *Nisi Prius* Roll is such *prima facie* evidence as will, if uncontradicted, satisfy the 2 Geo. 2. c. 23.? That act declares that no action shall be brought by an attorney upon his bill, till that bill has been delivered a month. At the trial the Plaintiff proves that his bill was delivered on a certain day, and then produces the record to shew that the action was commenced after the month had expired. We all know that the record is made up of the term in which issue is joined. That which is *prima facie* evidence of the action being properly commenced may be contradicted by the Defendant, whose business it will be to shew by a copy of the writ, that it was really commenced before the time. Were it not therefore for the very respectable authority by whom this nonsuit was directed, I should think this a very simple case. The record shews the commencement of the action, and sometimes indeed to the Plaintiff's peril, if he has not had the precaution to enter a special memorandum (*a*); as where the record is of the term generally, it relates back to the first day of the term (*b*). If then the record in some instances operate against the Plaintiff, why shall it not also operate in his favour?

BULLER J. of the same opinion.

HEATH J. of the same opinion.

ROOKE J. of the same opinion.

Rule absolute

(*a*) *Dodsworth v. Bowen*, 5 T.R. 325. (*b*) *Pugb v. Robinson*, 1 T.R. 116.

May 18th.
9 East, 79.
11 East, 182.

It being contrary to 7 & 8 W. 3. c. 4. for a candidate to furnish provisions to any voters after the teste of the writ, an inn-keeper cannot recover against a candidate for provisions so furnished at his request.

Payment of money into court is an admission of a legal demand only.

RIBBANS v. CRICKETT and another.

THE Plaintiff in this case was an inn-keeper, and the Defendants two of the candidates at the last election of representatives in Parliament for the borough of *Ipswich*. The action was brought on a bill for provisions furnished to the voters of the borough, at the request of the Defendants, consisting of three descriptions of charges; viz. 1st, For provisions furnished before the teste of the writ; 2dly, For provisions furnished after the teste of the writ to voters resident in the borough; 3dly, For provisions furnished to voters not resident in the borough. The Defendants

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Defendants paid into court sufficient to cover the charges of the first and last descriptions. At the trial before *Ashurst J.* at the last *Bury* Spring assizes, the Defendants contested the amount of the bill, and endeavoured to prove that the Plaintiff had charged for provisions furnished to persons not voters, but having failed to establish that defence, a verdict was found for the Plaintiff.

A rule having been obtained to shew cause why this verdict should not be set aside and a new trial be had on the ground of a part of the cause of action being contrary to 7 W. 3. c. 4.

Le Blanc and *Heywood* Serjt. shewed cause and argued, first, that as it did not appear that the provisions were furnished to the voters "in order" that the Defendants might be elected, the case was not within the statute, for that those words though used at the end of the second division of the clause must be construed to run through the whole (a). Next if it did come within the statute, that bribery was only *malum prohibitum*, and however criminal in the candidate, would not vitiate a contract entered into with another person; and resembled the case of money lent to play with, which may be recovered by action, though the play be contrary to an express statute. *Barjeau v. Walmsley*, 2 Str. 1249. *Robinson v. Bland*, 2 Burr. 1080. Lastly, that part of the provisions were furnished to voters resident at a distance from the borough, (which had never been considered in the decisions of the committees of the House of Commons to be within the meaning of the statute,) and the verdict being good as to that part of the demand, therefore the Plaintiff might apply the money paid into court to any other part which he might think proper.

Shepherd Serjt. for the Defendants insisted that the words "in order," &c. used in 7 & 8 W. 3. related only to the latter part of the clause (to which the Court agreed). He next argued that no person employed to carry into effect *malum prohibitum* was entitled to recover; and instanced the cases of persons selling goods for the purpose of being smuggled, and of insurances upon illegal voyages. He cited *Faikney v. Reynous*, Burr. 2069. *Petrie v. Hannay*, 3 Term Rep. 418. *Steers v. Lashley*, 6 Term Rep. 61.

(a) No person, &c. after the teste of the year, &c. shall before his election, directly or indirectly, give, present, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter make any promise, agreement, obligation, or engagement, to

give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, &c. or to or for the use, &c. of any such person, place, &c. in order to be elected, or for being elected to serve in parliament for such county, city, &c.

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Booth v. Hodson, 6 Term Rep. 405. and *Mitchell v. Cockburne* 1 H. Bl. 379. and inferred from those cases that as the demand arose out of an illegal transaction it could not be supported. A to the money paid into court, he said that the Plaintiff could not be allowed to retain it for the illegal demand, and receive for the legal one.

EYRE Ch. J. It seems to be the opinion of the whole Court that if the Defendants think proper to insist on their objection they must do it with success. This action is apparently founded on a contract to disobey the law, being to provide entertainment for voters during an election. The defence set up proves the principle of the contract, for the point contested at the trial was whether or not the Plaintiff had abused the confidence reposed in him, by squandering the provisions among persons who were not voters? Then how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very serious nature in the opinion of the Legislature, as appears by the preamble of 7 & 8 W. 3. c. 4. how then can we enforce a contract to do that very thing which is so much reprobated by the act? I am perfectly aware that great difficulties may arise from construing this act rigidly, but perhaps still greater will arise if it be not so construed. It is true that a voter who comes from a distance may have reason to complain if he is not provided with necessaries; but it is also obvious that if the candidate can supply him, he may supply himself. If any exception is to be allowed for voters not resident, the whole mischief complained of in the act will necessarily follow. It will be impossible for the candidate to make a distinction between those voters who reside at a distance, and those who live within half a mile of the place of voting. The Legislature has drawn a strict line which is not to be departed from: it says, that after the issue of the writ no meat or drink shall be given to the voters by the candidate; and that being the case, this Court cannot give any assistance to the Plaintiff consistently with the principles which have governed the courts of justice at all times, and with the cases which have been cited this day. Persons who engage in this kind of transactions must not bring their case before a Court of Law. With regard to the money paid into court, it is to be observed, that such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account.

Per Curiam.

Rule absolute.

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WILSON v. SAUNDERS.

May 18th.

TRESPASS for seizing goods under the following circumstances.

The Plaintiff purchased at the *India* sale a quantity of *Bandanno* handkerchiefs (which are prohibited to be used in this country by 11 & 12 Will. 3. c. 10.) and sent them down with the usual forms, under the care of a Custom-house officer, to the Custom-house at *Aldborough*, where they were put on board the *Experiment* cutter by the Custom-house officers, the Plaintiff having entered them for *Hamburg*, and the cutter having cleared out for that port, though she had only a licence to fish between *Flamborough Head* and the *Isle of Wight*, under 24 Geo. 3. c. 47. The Plaintiff had given security for the goods "being exported and not relanded" according to the directions of 11 & 12 Will. 3. c. 10. s. 2. The Defendant who was Captain of the *Argus* revenue cutter seized the vessel and goods after the former had proceeded some way down the river, but while she was within the limits of the port of *Aldborough*, and a tide-waiter of that port being on board at the time.

The cause was tried before *Heath* J. at the Summer assizes for *Suffolk* 1797, when a verdict was found for the Plaintiff with liberty to the Defendant to move to set it aside in the ensuing term.

Accordingly *Le Blanc* Serjt. having in *Michaelmas* term obtained a rule to shew cause why the verdict should not be set aside and a new trial had, because the *Experiment* cutter, having been found acting in a manner not warranted by her licence, was to be considered as having no licence;

Shepherd Serjt. in the following term was proceeding to shew cause on the above ground, when the Court said, that if the goods were *bonâ fide* delivered for exportation, the Plaintiff's case was clear; but that if there was no *bonâ fide* intention to export them, it might be a question whether they were not seizable under 11 & 12 Will. 3. c. 10. s. 2. in the same manner as if they had been found exposed in a shop for sale: and directed him to speak to that point.

Shepherd. Supposing it were manifest that these goods were meant to be relanded, yet I submit that neither could they be seized, nor would the Plaintiff's security be forfeited, until some attempt

If goods prohibited from being sold in this country by 11 and 12 W. 3. c. 10. are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be relanded, they are liable to be seized, though no actual attempt to reland them has been made.

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attempt had been actually made to accomplish that purpose. If the goods had been carried out to sea with the avowed intention of being relanded, and the vessel on board which they were put had been lost in a storm before any attempt towards relanding had been made, clearly the security would not have been forfeited, which shews that the forfeiture does not attach on the intention. Besides, the mere putting goods on board a vessel which has a licence to fish between certain points only, does not of itself raise a presumption that the goods are to be carried to any place beyond those points; for the vessel in contravention of her licence may go to *Hamburgh* or any other port, though she can never return to this country without being subject to forfeiture.

EYRE Ch. J. See how this case would stand if it were put in pleading. The officer's *prima facie* defence would be, "I seized "these goods because I found them on board such and such a "vessel, and not in a warehouse approved by the commissioners "of the customs, according to 11 & 12 Will. 3. c. 10. s. 2." To this the Plaintiff would answer, "True it is, that the goods were "not in such a warehouse, yet I am by law allowed to export "them; and I have a right to take them out of the warehouse for "exportation, provided I give a bond to export and not reland "them;" and would aver that he took them out of the warehouse for exportation, and that he gave a bond, &c. The Defendant might deny that the goods were taken out of the warehouse in order to be exported, and on this an issue would be joined. The question for the jury would then be, whether, when a person goes through the necessary ceremonies which belong to a fair exportation, and puts his goods on board a vessel colourably bound for *Hamburgh*, but in fact a cutter licensed to fish between *Flamborough Head* and the *Isle of Wight*, together with all the circumstances which belong to this case, tending to prove that they were not meant to be exported, he can be considered as having taken them out of the warehouse in order to export them? My opinion is, that if it could be demonstrated that he had no intention to export them, and that he meant to put them on board a vessel, in order to be carried one, two, or three leagues only from the shore, proof of that intention would defeat the allegation that they were taken out of the warehouse for the purpose of exportation. The circumstance of actual relanding need not be shewn, for the case would be vitiated by the original intention with which the goods were taken out of the warehouse. I think that the circumstances of the case afford a presumption on this

this one point, which ought to be submitted to a jury. There may have been reasons of necessity sufficient to justify the Plaintiff in having acted in the manner which he has done; and he will have an opportunity of inflicting upon them at a new trial. I am anxious that the principle of these laws should be a little understood, and that an idea should not be entertained, that if all the form and ceremonies prescribed by the act are complied with, the substance may be evaded with impunity.

Per Curiam,

Rule absolute.

At the Spring assizes following the cause again came on to be tried before *Ashurst J.*—and it being left to the jury to determine whether the goods were put on board the cutter with the intention of being exported, a verdict was found for the Defendant.

In consequence of which *Shepherd* Serjt. in this term obtained a rule nisi for a new trial on two grounds: 1st, That the goods at the time of the seizure were in *custodia legis*, having been sent down to *Aldborough*, under the care of a Custom-house officer, having been put on board the vessel at *Aldborough* by Custom-house officers, and an officer having been on board at the time when they were seized: 2dly, That the goods were in a course of exportation, no act towards relanding them having been done.

But the Court, after hearing *Shepherd* on this day, were clearly of opinion, That the goods were not in the custody of the law, for that the owner after giving security in *London* according to the statute was at liberty to export them as he thought fit; that the practice of sending down an officer with the goods was not required by the 11 & 12 W. 3., but had been adopted from 6 G. 3. c. 40. s. 6. which relates to the exportation of *East India* goods to *Africa*; and that the officer who was on board at the time of the seizure was placed there for the general protection of the revenue, not to watch these particular goods. As to the second point, that there was no distinction between an intention to export the goods, and their being in a course of exportation: and that if it could be demonstrated that all intention to export them was abandoned, the bond of security might be put in suit, though all the forms necessary to exportation had been complied with.

Rule discharged.

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*May 18th.**I Term. 414.*

The Court set aside a warrant of attorney, and judgment given to secure a loan, which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up, which had been given to procure the Defendant's release out of execution on the judgment.

EDMONSON v. POPKIN.

*H*ERWOOD Serjt. moved for a rule to shew cause why a warrant of attorney given to secure an usurious loan, and the judgment entered up thereon should not be set aside, and why of exchange, given by the Defendant for the purpose of procuring his release out of execution on the judgment, should be ordered to be delivered up: he cited *Machin v. Delaval, Barn* 3d edit., and said, as to the latter part of the rule, that taking a bill of exchange was a contempt of the Court.

But the Court thought that the rule ought to be confined to the warrant of attorney and judgment, as they were not to decide the question of usury in a summary way: and that they might have interfered at all, but in order that the question of usury might be tried, which would be shut out if the judgment allowed to stand.

Accordingly a rule *nisi* for setting aside the warrant of attorney and judgment was granted, and afterwards

Made ab.

May 18th.

BOWRING v. EDGAR.

A note for securing the weekly allowance to a prisoner under the Lords' act, need not be stamped.

THE Plaintiff having given the Defendant, who was a prisoner in execution, a note for his weekly allowance on a fixed stamp, *Le Blanc* Serjt. obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged from custody, under the Lords' act (a), contending that as the last act (b) had increased the stamp of 6d. imposed by 31 Geo. 3. to 8d.; the stamp on the note given by the Plaintiff must be considered as a nullity: and cited *Pittman v. Haines, 7 Term Rep.* where the Court of King's Bench held that such a note as that in question ought to be stamped.

Williams Serjt. in shewing cause insisted that no stamp was necessary; for that by 32 Geo. 2. c. 28. the duty is imposed on those notes only where "the sum expressed therein or made payable thereby shall amount to 40s.;" whereas the sum expressed in the note in question was only 3s. 6d.: and added, that

(a) 32 Geo. 2. c. 28.

(b) 37 Geo. 3. c. 90.

sum owing under this note never could amount to 40s. since it is provided by the Lords' act, that if the allowance be not paid weekly the Defendant may apply for his discharge, even in the time of vacation.

The Court inclined to this opinion, but ordered the matter to stand over that they might have an opportunity of conferring with the other Judges.

Early in the next term, *Eyre Ch. J.* said, that a conference had taken place between the Judges, who were of opinion that no stamp was necessary.

Per Curiam,

Rule discharged. (a)

(a) *Tchell v. Coffey*, 7 T.R. 670.

OSBORN v. TATUM.

May 19th.

Shepherd Serjt. having on a former day obtained a rule nisi, for setting aside an execution on a judgment entered on a warrant of attorney,

Cockell Serjt., who was now to have shewn cause, took the following preliminary objection, viz. that the affidavit on which the rule nisi had been obtained was not intitled in any court, the words "in the" only being prefixed, without "Common Pleas."

Shepherd contra insisted, that the title was not a necessary part of the affidavit; as it appeared from the jurat, that it was sworn before one of the Judges of this court; and that, even if it were necessary, still the objection came too late, as the rule had been enlarged for ten days, on the application of the other side.

The Court however held it to be a sufficient objection, and discharged the rule; though without costs, in consequence of its having been enlarged.

Rule discharged.

CETWIND v. MARNELL, Executor of General BROME. May 19th.

A n action having been brought on a bond of the testator, the Defendant craved oyer of the bond, pleaded *non est factum*, and now moved for a rule calling on the Plaintiff to shew cause, why he should not allow the bond to be inspected in his hands by an officer of the stamp duties.

The Court will not make a rule on a Plaintiff who brings an action on a bond, to allow an officer of the stamp duties to inspect the bond, because the Defendant suspects it to be forged.
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Marshall Serjt. stated the ground of this application of suspicion that the bond was forged; and contended, that there could be no objection to the Court's granting the rule, as the instrument would remain in the Plaintiff's hands, and it need not be compelled to produce it if indicted for forgery.

Sed per Eyre Ch. J. This case was before me at Ct but I thought it would be a violent measure to order the Plaintiff to produce an instrument which might be the means of conviction of him of a capital felony. The Defendant has already pleaded *falsum*, and therefore the Plaintiff will be obliged to prove his bond, if he means to succeed in his action. But as he may be better off by it, we ought not to put his life in danger by the exercise of a summary jurisdiction.

Marshall took nothing by this motion.

In the Exchequer Chamber.

May 19th.

Pof. 297, &
9 Ref. 411.

The exclusive right of trading to the *East Indies* granted to the *East India Company* by stat. 9 & 10 W. 3. has never been put an end to, and any infringement of it is a public wrong.

Though such parts of that act as inflicted penalties, &c. were repealed by 33 Geo. 3. c. 52.; and though the latter act says, that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c. it is competent to underwriters who have subscribed policies on ships trading to the *East Indies*, in contravention of 9 & 10 W. 3. to avail themselves of the illegality of such trading, in an action to the policies.

CAMDEN and others v. ANDERSON, in Error

A WRIT of error having been brought in this court, on the appeal given in the *King's Bench* between these parties, the cause was twice argued; in Trinity Term 1797, by *Parker* Plaintiff in error, and *Giles* for the Defendant; and in Easter 1798, by *Wood* for the former, and *Rous* for the latter: the grounds of argument were nearly the same as those taken in *King's Bench*, and most of them were noticed in the judgment of the Court, the account of them is here omitted.

The Court took time to consider of their opinion, which day delivered by

Eyre Ch. J. who, after stating the special verdict, (for which see the arguments and judgment in the *King's Bench*, see 6 T. proceeded thus:— The cause of the Plaintiffs in this action is *facie* plain and clear; for a consideration in money, the Defendant *Anderson* has assured the Plaintiff's ship the *Albemarle* against loss in the voyage described in the policy stated in the deed of lading. The ship was captured by the enemy in the course of that voyage, by which a loss is incurred, which the Defendant has undertaken to make good. The defence is founded upon a principle which is paramount to all obligation by which the parties contract can bind themselves, and is powerful enough to

contravene of 9 & 10 W. 3. to avail themselves of the illegality of such trading, in an action to the policies.

it, and to render it null and void in law. That which is unlawful in itself, and which is a public wrong, cannot be the ground of an action. The Defendant insists, that the voyage insured was in an illicit and a clandestine trade; that, as such, it was unlawful, and could not be the subject of an assurance. The principle has been admitted, in the course of the argument, at the bar; the application of it to the particular case only has been controverted. The Plaintiffs in the action insist, that the provisions of the statute of 33 Geo. 3. preclude the application of it to this case; admitting that which upon this special verdict it is impossible to deny, that this ship *Albemarle* was engaged in an illicit and clandestine trade. This act of 33 Geo. 3. c. 52. is very voluminous, having for its object the continuing in the *East India Company* the possession of the *British* territories in *India*, together with their exclusive trade, the establishing further regulations for the government of the said territories, and several other purposes therein mentioned. The provisions which respect the exclusive trade are to be found in the 129th and the subsequent sections to the 150th section inclusive; two sections only, viz. the 148th and 149th, which are provisions respecting other matters, being interposed rather inconveniently, as breaking the thread of the subject, and particularly the connection between the 147th and the 150th sections, which should be taken together in order to understand the 150th section upon which this question turns. The 129th section recites, that "various statutes have been heretofore made for securing to the said United Company their sole and exclusive right of trading to the *East Indies* and parts aforesaid, during the continuance of such sole and exclusive right, and to restrain all illicit and clandestine trade to, in, and from the *East Indies* and parts aforesaid: and that the limitations and provisions in the said act contained, concerning the future conduct of the said trade, require that some alterations should be made in the said statutes; and that it might be convenient that such provisions as should be deemed necessary for securing to the said Company the full benefit of such sole and exclusive right, subject to the provisions and limitations contained in the said act, and for restraining all clandestine and illicit trade to, in, and from the said *East Indies* and parts aforesaid, should be reduced into one act of parliament." It is here stated very distinctly what the object was which the Legislature had in view and meant to provide for in this part of the act: they have said, that the limitations and provisions in this act contained, concerning the future conduct of the *East India* trade, require that some alter-

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ations should be made in the statutes for securing the exclusive trade, and for restraining the illicit and clandestine trade; as they have said that it would be convenient that such provisions should be deemed necessary for securing the exclusive trade, as for restraining the clandestine and illicit trade, should be introduced into one act of parliament: they proceed accordingly make those alterations, and to reduce those provisions into that act. The 129th section proceeds to enact in the terms of former existing laws, that ships, &c. of unlicensed persons, trading with the limits of the *East India Company*, should be forfeited. The succeeding sections enact, that persons going to those parts as to be deemed to have traded unlawfully, are to be liable to fine and imprisonment, may be arrested and sent to *England* for trial with various other regulations in the terms of the former existing laws. For the purpose of effecting the reduction of the provisions for securing the exclusive trade, and for restraining the clandestine and illicit trade, into this act, the 146th section repeals so much of the 9 & 10 Will. 3. c. 44. as inflicts any penalty or forfeiture for illegally trading to the *East Indies*; the whole of the statute 5 Geo. 1. c. 21.; so much of an act of the 7 Geo. 1. c. 21. as relates to the punishment or prosecution of persons illegally trading to the *East Indies*; the whole of the statute of 9 Geo. 1. c. 26.; much of the statutes 3 Geo. 2. c. 14. and 17 Geo. 2. c. 17. as creates any penalty or forfeiture; and so much of 10 Geo. 3. c. 47. subjects any persons concerned in the illicit trade to, in, or from the *East Indies* to any penalty; parts of some other statutes immediately relating to the exclusive trade, and therefore unnecessary to be enumerated; and, lastly, so much of 26 Geo. c. 57. as makes offences against any law for securing the exclusive trade of the Company, and forfeitures and penalties for illicit trading, prosecutable in the *East Indies*.

Mr. Wood, of counsel for the Plaintiffs, arguing upon the effect of the repeal of part of the statute of 9 & 10 Will. 3. insisted, that though the free trade of the *East India Company* was left untouched, so much of the statute of King William as granted an exclusive trade was repealed. This was a very material point for him to maintain; but it is wholly unfounded; it will be found to be warranted neither by the letter nor the spirit of the statute of 33 Geo. The 81st section of the statute 9 & 10 Will. 3. enacts, that after the 29th September 1698, such persons or corporations as had power to trade to the *East Indies* should have the sole trade; and provides that the *East Indies* should not be visited by any other of the King's subjects during the time this trade was to continue. It then pro-

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seeds to impose penalties on such others of the King's subjects as should trade there. The section therefore consists of at least two if not three different branches; the first makes the trade exclusive in the Company; the second is a prohibition to the rest of the King's subjects; the third imposes penalties. The repeal of a part of this statute by 33 Geo. 3. does not import to be a repeal of the whole section; it does not even import to be a repeal of the prohibition; it repeals in terms so much only of the statute as inflicts any penalty or forfeiture, which is the third branch of the section. It is clear therefore that so much of this statute as grants the exclusive trade is not within the letter of the repealing clause of 33 Geo. 3.; and it is equally clear that it is not within the spirit of it. The whole operation of this part of the statute was meant to be confined to the regulation and re-enacting in one of the provisions made to secure the exclusive trade, and to restrain the illicit and clandestine trade; it was not necessary to my effect, which this part of the statute of 33 Geo. 3. was to produce, that the exclusive trade should be touched by the statute. Parliament in its justice could not meddle with it during the term for which it was to continue. It had been purchased by the *East India Company*. There is an apparent absurdity in the notion, that this could be the subject of any of the repealing clauses; its existence in full, absolute and indefeasible right is the foundation of the whole of this parliamentary regulation. If parliament had meant to make the exclusive trade granted by the statute of King *William* the subject of its repealing clause, would it have passed over wholly unnoticed the several statutes which have from time to time continued to the Company their exclusive trade down to and beyond the present hour, and above all would it have omitted to re-grant it, when it was re-enacting all the provisions for securing it? If it was touched by the repealing clause, for any thing I can see to the contrary, it is gone for ever; for certainly it is not re-enacted, unless we are to say, that being repealed by implication it shall also be re-granted by implication. But I waste too much time upon so plain a proposition. I state it as clear, that the statute of 33 Geo. 3. has left the exclusive trade of the *East India Company* untouched. The consequence is of importance in this argument; it lays the 150th section of this statute, which has been the subject of so much elaborate discussion, quite out of the case. A statement of this section, and a short examination of it, and a comparison of it with its context will make this most manifest. The 150th section is in these words: "And for obviating any doubts which might otherwise

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" arise how far any of His Majesty's subjects may, notwithstanding
 " ing the aforesaid repeal of the several acts or parts of acts, be
 " entitled to recover any debts due to them in *Great Britain* or
 " in parts beyond the seas, or otherwise to enforce the execution
 " of any contracts or agreements by reason of any pretext to be
 " set up by any other person or persons that such debts were
 " contracted, or that such contracts or agreements were made
 " contrary to the restrictions or prohibitions in the said acts or
 " some of them contained; be it further enacted that it shall no
 " be competent or lawful to or for any Defendant or Defendant
 " in any suit or action now depending or hereafter to be brought
 " in any court either in *Great Britain* or in the *East Indies* to
 " plead or set up any act or acts in the whole or in part repealed
 " by this act in bar of any such suit or action or of any judg-
 " ment or recovery to be obtained therein, but that the Plaintiff
 " or Plaintiffs in all and every such suits or actions as well in
 " law as in equity shall have the same remedy to recover, and be
 " entitled to the like judgment, verdict, decree, and execution
 " as if the said acts or parts of acts so repealed had never been
 " made." I need not remark, that this is a very ill penned
 clause; with its context however it does not appear to me that
 it would be very difficult to expound it. For the purpose of in-
 troducing some alterations and of re-enacting in this act the sub-
 stance of the provisions of former laws imposing certain penalties
 and forfeitures, the whole of some of those laws and such part
 of others of them as impose penalties and forfeitures were repealed
 but with two provisos; the 1st, that such repeal should be no
 bar to prosecutions for offences in respect of which those acts and
 parts of acts repealed had imposed penalties; the 2d, that such
 repeal should be a bar to a defence in a civil action, on the
 ground, that the contract which was the subject of that action
 was contrary to the restrictions or prohibitions in the said acts or
 parts of acts so repealed. This last proviso in the 150th section
 contains no general provision, making the illicit and clandestine
 trade lawful, but contrasting actions for debts and upon contra-
 with offences; it provides, that the repeal shall have all the effe-
 it can have in the former case to enable a creditor to recover
 his debts (in which respect it has been called, not improperly
 an Act of Grace); and that it shall have no effect at all in the
 latter case, to prevent an offender from being punished for his
 offence. If therefore the trade of the interloper is made unlawfully
 illicit, and clandestine, only by the acts and parts of acts repeale-

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then by force of this proviso no advantage is to be taken by way of defence in a civil action of this illegality; but if it is unlawful and clandestine upon other and higher grounds, as it will be found to be, this proviso affords no protection against the defence of illegality, and must be laid entirely out of the case. These Plaintiffs, if they should be driven from this which has been considered as their strong hold, may still insist that the exclusive trade of the Company is no more than their private right, the infringement of which may perhaps give a right of action to the Company, as for a civil injury over and above the several parliamentary provisions which have been made for securing it, but can have no further effect, and particularly cannot taint with illegality transactions and contracts which are collateral to it. Suppose for instance, a printer were to bring his action against his employer for printing a pirated copy of a work protected by the statute of Queen *Ann*. The employer perhaps could not object by way of defence against this action, that the printing as an infringement of the private right of the author was unlawful, and the contract void in law. When this point was suggested, in the course of the argument Mr. *Rous* answered, that the exclusive trade of the Company was a public regulation of the national commerce, and this was a very good general answer; but I will enter a little further into the discussion of it. This exclusive trade of the *East India* Company is now so interwoven with the general interests of the state, that it is no longer to be considered as the private right of a corporation, but is become a great national concern, and the infringement of it is *Pof. 297.*

^{10 Co. 100.} a public mischief and a public wrong, and as such is prohibited by the common law. The principle, and the effect of that prohibition, as applied to the present case, may be collected from the case of a bond given to the sheriff to indemnify him against the voluntary escape of his prisoner, which is pronounced to be void by the common law. That case is put in *Beaufage's case*, ^{10 Co. 100.} and is recognized in the books of the best authority in our law, viz. *Yelv.*, *Dyer*, *Hobart*, and *Plowden*. The references are in the margin of ^{10 Co. fo. 100.} (a) If we consider it in one single point of view, as it regards the public revenue of the state, it will be found to be no less the right of the public than of the *East India* Company. That parliament has so considered it may be collected from the preambles of the statutes made for the protection of this trade. The preamble of the statute 5 Geo. 1. c. 21. recites it to be of great importance to the welfare of this kingdom, that this

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(a) *Yelv.* 197. *Dyer* 224. pl. 32, 33. *Hob.* 14. *Plowd.* 64. b. 67. b. 68. b.

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trade should be regulated according to the acts of parliament relating thereto, and the royal charters or grants made in pursuance thereof. This statute recites some of the provisions 9 & 10 W. 3, and that it is provided by that act and by subsequent laws that the merchandize to be laden upon ships bound from the *East Indies* should be brought to *Great Britain*, and that several of His Majesty's subjects have presumed to trade to *East Indies* in foreign and other ships, intending there to sell goods, and to bring them into *Europe*, and land them in foreign parts out of His Majesty's dominions, to the great prejudice of the trade of this kingdom, and the *diminution of His Majesty's customs and other duties*. It recites a proclamation issued to prevent these practices, and that evil disposed persons had still gone on to procure foreign commissions, and under colour thereof, otherwise, had fitted out and manned several *English* and other ships, and had sent them to trade in the *East Indies*; and after the preamble, it introduces the provisions of the act, with these memorable words: "Now to the intent that such *collusive, fraudulent and illegal trade and practices* may be prevented, and that a considerable and beneficial a branch of trade may be secured to this kingdom; be it enacted, &c." The preamble of 7 Geo. 1. c. 21. is yet stronger: "Whereas it is of importance to the welfare of this kingdom that the trade to and from the *East Indies* be carried on in such manner as that the *British* nation may have and enjoy the full fruits and advantages thereof; And whereas by virtue of several acts of parliament and letters patent the whole trade to and from the *East Indies* is now so vested in the United Company, &c. notwithstanding which and the prohibitions, injunctions, and penalties contained in such acts and letters patent, several evil-minded persons, subjects of His Majesty, preferring their own private gain to the good of their country, have not only clandestinely traded to the *East Indies*, but by colour of commissions from foreign governments, have fitted out ships and engaged *British* seaman to serve on board the same, and sent them to the *East Indies*, to the diminution of His Majesty's revenue, and of the naval force and commerce of this kingdom: Now to the intent that such *wicked, mischievous, and destructive practices* may be prevented for future, and that the trade aforesaid may be more effectually guarded and successfully carried on," &c. The statute then proceeds to make several provisions, upon which I shall only serve here, that they are calculated to prevent the evil of clandestine trade in general, and that the circumstance of

fore

foreign commission is considered only as one of the modes in which that trade was carried on. If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign spirits bought or sold in the course of a contraband trade, we say without hesitation, this is a contract against law, and no action can be maintained upon it, and if the action were founded upon a policy of assurance upon a ship, or goods, employed or carried in the course of that contraband trade, we should not hesitate to say, that no action lies upon such a policy; and surely it must be a reproach to law and justice if we were now to countenance an action upon this policy, the object of which is, to assure to these Plaintiffs the safety of a ship engaged in a trade so illicit and clandestine as this trade has been declared by parliament to be, under such aggravated circumstances of fraud and collusion, in the manner of carrying it on, as are described in this special verdict, and which it might have been reasonably supposed no man who had a regard for his reputation as a merchant, or had any sense of truth and private honour, would have suffered to have stood against him upon the public records of one of the King's supreme Courts of justice. Let this judgment be affirmed.

Judgment affirmed.

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CAMDEN

ANDERSON,
in Error.

In this Term *Baker John Sellon* of the *Inner Temple*, Esq. was called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"Respicere quid moneant Leges."

THE END OF EASTER TERM.



C A S E S

1798.

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Trinity Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

WEBB v. HERNE and Another, Sheriff of MIDDLESEX.

June 15th.

14 East, 224.

ESCAPE against the sheriff. The Plaintiff in his declaration stated that J.S. was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," and gave the sheriff notice to produce the writ, which not having been complied with, he called the attorney, who at the trial proved from an entry in his book that such a writ had been issued. Though this was not the next best evidence, no objection was taken on that head; but it was contended for the Defendant, that the words "by virtue of an affidavit now on record" being a substantive allegation, must be proved; and the Plaintiff not being able to produce the affidavit, *Eyre Ch. J.*, before whom the cause was tried, nonsuited him.

In escape against the sheriff, if the Plaintiff aver in his declaration, that J. S. was arrested "under a writ indorsed for bail by virtue of an affidavit now on record" he must produce the affidavit in evidence, though the latter part of the averment was unnecessary

Shepherd Serjt. now moved for a rule nisi to set aside the non-suit, and contended that it was not necessary to produce the affidavit, for had the sheriff enabled the Plaintiff to shew the writ itself, it would have sufficiently appeared that it was indorsed for bail.

BULLER

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WEBB

HORN

BULLER J. I remember a case in Lord Mansfield's time where it was held unnecessary to produce the affidavit, but the declaration there differed from the present one, since it only stated generally that a writ was sued out "indorsed for bail £——." (a)

EYRE Ch.J. If I had understood this to have been such a case, I should have left the evidence to the jury: but it appeared to me that there was a substantive allegation of the existence of an affidavit, which must be proved.

Shepherd took nothing by his motion. (b)

(a) See *Croke v. Dowling*, *E. 22 G. 3.* *Bull. N. P.* 14 last ed. and *Rogers v. Ilf-*
Briestow v. Wright, *Dougl. 665.* 3d ed. *alio*
combe, Taunton, Lent Att. 1785. *Esp. N. P.* 535.
what is said by Buller J. in the King v. Holt,
5 T.R. 446. and *Peppin v. Solomon*, *5 T.R.*
497.

June 15th.
Pof. 393. S.C.

PARKIN v. RADCLIFFE.

It seems that a custom for the homage to affect a compensation in lieu of a heriot, to be paid by an in-coming copyholder on surrender or alienation, is not good. If the lord set up a custom to have the best live or dead chattel as a heriot, *quare* if the tenant can modify that custom by pleading another, that the homage shall affect a compensation in lieu of the heriot?

REPLEVIN of a cow.

R AVOWRIES. 1st, For that the said cow at the time of taking the same, was the property of the Defendant. 2d, For that the place in which, &c. was parcel of a certain tenement situate in the township and manor of *Marsden*, and held of that manor, of which manor the Defendant at the time of the taking was lord, and because a heriot, that is to say, the best beast of the Plaintiff was due, and not delivered to the Defendant for the said tenement, the Defendant well avowed, &c. 3d, For that the place in which, &c. was parcel of a certain customary tenement situate in the township and manor of *Marsden*, within which manor from time whereof, &c. there had been divers customary tenements demised and demiseable by copy of the Court Rolls of the manor by the lord of the manor and his steward for the time being, to any persons willing to take the same in fee-simple, or otherwise at the will of the lord according to the custom of the manor, and that within the manor, there was, and for all the time aforesaid had been a certain ancient and laudable custom used and approved of, that is to say, that the lord of the manor for the time being from time whereof, &c. had been used and accustomed to take and have upon the admission of every customary tenant of the manor to every such customary tenement to which such tenant had been admitted, upon the surrender or alienation of any former tenant of such customary tenement, the best chattel,

alive or dead, of such tenant so admitted as aforesaid, upon such surrender or alienation, after such his admission to the same tenement, for and in the name of a heriot for such customary tenement: that the tenement of which the place in which, &c. was parcel, was from time whereof, &c. parcel of the said manor and a customary tenement; that the Defendant was lord of the manor; that in 1786 one J.H. had been admitted tenant of the said customary tenement; that in 1792 J.H. surrendered into the hands of the Defendant to the use of the Plaintiff and his heirs; that the Plaintiff was admitted, and entered, and was still seised thereof; and because at the time when he was so admitted, and from thence until and at the said time when, &c. he was possessed of the said cow as of his own proper cow, the Defendant well avowed the taking the said cow as the best living chattel at the time of the Plaintiff's admission, for and in the name of a heriot: and this, &c. wherefore, &c. 4th, The same as the last, only stating the custom for the landlord to take "the best beast," instead of "the best chattel alive or dead."

Pleas in bar. 1st, Issue on the first avowry. 2d, That the heriot was not due as alleged in the second avowry, and issue thereon. 3d, Traverse of the custom in the third avowry. 4th, Traverse of the custom in the last avowry. 5th, That in the said manor in the third avowry mentioned there had been from time whereof, &c. a certain other ancient and laudable custom used and approved within the same, that is to say, that at the Court Baron of the lord of the said manor for the time being, held in and for the said manor, the homage of the said Court Baron from time whereof, &c. had been used and accustomed to assent upon their oaths a reasonable sum of money to be paid upon the admission of every customary tenant, to any customary tenement to which such tenant had been admitted, upon the surrender or alienation of any former tenant, after such his admission, in lieu of such heriot by the said custom in the said avowry claimed, and which same sum of money so assented ought to be paid to the lord of the manor by such customary tenant, and ought to be accepted by such lord in lieu of such heriot by the said custom in the said avowry claimed. 6th, To the last avowry the same custom as in the preceding plea. 7th, To the third avowry, that within the said manor there was another custom that every customary tenant upon his admission should pay to the lord, in lieu of such heriot by the said avowry claimed, such reasonable sum of money as should

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should be agreed upon between such lord and customary tenant; and if they should disagree about the same, then such reasonable sum as should be assedged by the Court Baron at the homage; and that when the said sum of money so agreed upon or assedged had remained unpaid after reasonable request and demand, the lord of the manor for the time being, from time whereof, &c. had been used and accustomed to take a reasonable distress for the same. 8th, The same plea to the last avowry.

Replication tendering issue on the traverses in the third and fourth pleas, and demurring to the fifth, sixth, seventh, and eighth.

Rejoinder joining in issue and demurrer.

Cockell Serjt. in support of the demurrer. 1st, The customs stated in the pleas in bar are unreasonable and uncertain, and therefore bad. There is no criterion shewn by which the homage may judge how to assess a compensation for the heriot, whereas some rule ought to appear by which the rights of the lord and the tenant may be preserved. There is a case mentioned in *Noy* 2. by the name of the *Yelmeſter Custom*, reported in *Noy* 3. by the name of *Crabb v. Bales*, and recognized in 1 *Rolle* 48. under the name of *Crabb v. Bevis*, where a custom that a copyholder for life might nominate one or two that should have the copyhold lands after his death for a fine to be assedged by the homage, if they could agree with the lord, was adjudged to be good. But this seems to be answered by *Bill's* case, 4 *Leon.* 238. where the same custom was held good, only with this qualification, viz. that the sum assedged should not be "lesser than had used to be paid where the lord would assess a reasonable fine." 2dly, Supposing the customs to be good, yet as it is admitted on the pleadings that the lord has a right to the heriot, though subject to a compensation to be assedged by the homage, it should have been stated either that some compensation had been assedged, or that some step towards an assessment had been taken.

Clayton Serjt. *contra*. We have a right to modify the custom stated by the Defendant, by setting up another custom on our part; for a heriot not being due of common right, but the mere creature of custom, ought to be regulated by custom. No cases have been cited to prove this custom unreasonable or uncertain; nor is the discretion of the homage more arbitrary in this case than in all cases where juries are to decide. The case in *Noy* is of no slight authority, having been recognized in 1 *Rolle* 48. and in *Perkins v. Titus*, 3 *Mod.* 134. Certainly the custom here is not

more unreasonable than that which was held good in *Wallis's case*, *Cro. Jac. 555*. As to the second point, it is the business of the lord whose tortious act is complained of, to set out what is necessary to his own justification.

EYRE Ch. J. My difficulty is, how to incorporate the two customs. The landlord pleads a custom to have the best live or dead chattel as a heriot; the tenant answers that he is not entitled to the best live or dead chattel, but to a sum of money by way of compensation. This is pleaded two ways, first, as a sum of money to be assedged absolutely by the homage; secondly, as a sum to be agreed upon by the landlord and tenant, and on failure of an agreement then to be assedged by the homage. Either of these pleas is an absolute denial of the custom that the lord should have the best live or dead chattel. This compensation is pleaded to be *in lieu* of a heriot; but since it is stated not to depend upon the will either of lord or tenant, but to take place in all cases, it cannot be *in lieu*; it ought therefore to have been stated in the name of a heriot, and as an inducement to a traverse. If the Plaintiff had said, true, there is such a custom, but if the tenant prefer to pay a sum of money in lieu, then he shall pay such a sum as the parties shall agree upon, that would have been a modification of the custom, and the money would have come in lieu of the original right of the landlord, but here the original right is stated in two contradictory ways. (a)

BULLER J. I am not quite clear that the customs stated on these pleas may not stand together, as well as those in *Kenchin v. Knight* (b). No answer however has been given to the argument advanced against the goodness of the custom set up by the pleas in bar, viz. that there is no rule to direct the jury in assessing the amount of the compensation. I think the custom bad.

HEATH J. All the members of the homage are liable to pay this compensation, and are therefore interested in the assessment. Suppose a custom that the parishioners of a certain parish should assess a compensation to be paid to the rector in lieu of tithes; it would be void as unreasonable and uncertain. In the case in *Leonard* the landlord could never be injured by the assessment, and he might be put in a better situation.

ROOKE J. I have not the same difficulty with respect to the custom. A heriot is not due of common right as tithes are, but is the mere creature of custom. The lord has no right but by cus-

58. (a) *Vide Bland v. Moseley*, cit. 9 Rep. Car. 432. and *Murgatroid v. Law, Carter*.
Spencer v. Day and Another, Cro. 117.

(b) 1 Bl. 49. 1 Wilf. 253. B.R.

tom,

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tom, which is the life of copyhold. This is a claim of the first imprecision, for the lord does not claim from the out-going tenant, but from the in-coming tenant, who is to have his best beast taken from him: and yet I conceive that it may be good and reasonable that the in-coming tenant should pay such a sum of money by way of acknowledgment to the landlord, as the homage shall affect. However I incline to think that the plea in bar is not well pleaded.

The Court then offered a second argument, which being declined by the parties who meant to go to trial on the issues joined, the Court said that as they were all of opinion, though on different grounds, that the demurrer must prevail, they should give Judgment for the Defendant.

June 18th.

 3 Bro. C. C. 1.
 6 Vez. Jun. 805.
 6 Vez. Jun. 301.
 S. P.

The creditors of a bankrupt entered into a deed of composition to receive 8s. in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt and join in a petition to the Chancellor, to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8s. in the pound on both debts, and then recovered the full value of some of the bills: Held that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received.

STOCK v. MAWSON.

THIS was an action for money had and received. The circumstances were as follow. A commission of bankrupt having issued against the Plaintiff, and an assignment of his effects having been executed under that commission, the creditors, of whom the Defendant was one, entered into a deed of composition with the Plaintiff, wherein, after reciting the commission and assignment, they agreed to accept 8s. in the pound "upon the amount of their respective debts, and in full discharge thereof," to be secured by the promissory notes of three sureties, and in consideration thereof "to release and discharge the said William Stock, his heirs, executors, and administrators, estate and effects, of and from the debts to them due and owing from him," and to join in a petition to supersede the commission. The deed then went on with a general release "of all actions, suits, debts, sums of money, accounts, reckonings, damages, claims, and demands whatsoever, both in law and equity," and relinquished and gave up to the Plaintiff, his executors, administrators, and assigns, "all and singular the stock in trade, household goods, plate, china, linen, and furniture, books, debts, and other debts and sums of money due, owing, or belonging to him, from any person or persons whomsoever, and all bonds, bills, notes, and other securities for the same; and all other the estate and effects whatsoever of the said William Stock, whereof or wherein he the said William Stock, or any person or persons in trust for him or for his use, was or were seized or possessed or interested on the day of the date and issuing forth of the

"the said commission, and on any day since, and all benefit and advantage whatsoever to be made, had, or derived thereby or therefrom." At the time when this deed was executed the Plaintiff was indebted to the Defendant in two different sums of money on two different accounts, *viz.* 1113*l.* 19*s.* 5*d.* and 1107*l.* 5*s.* 5*d.*, for securing the latter of which he had given the Defendant bills to the full amount. The whole 2221*l.* 4*s.* 1*d.* was proved, and a dividend of 8*s.* in the pound received by the Defendant on that sum: after which he called upon the acceptors of the bills and obtained on one of them 20*s.* in the pound and different sums upon the others, considering himself indeed as a trustee for the Plaintiff, to the amount of all which he received above 12*s.* in the pound on any of the bills, but retaining that sum for which the present action was brought.

The cause was tried before *Rooke* J. at the *Guildhall* fittings after *Easter* term, when a verdict was found for the Plaintiff for 116*l.* A rule having been obtained on a former day to shew cause why this verdict should not be set aside and a new trial had,

Le Blanc and *Shepherd* Serjts. now shewed cause. This question will depend on the construction of the deed. It will be contended that the deed being substituted in the place of a commission of bankruptcy, the parties must stand in the same situation under the former, as they would have done under the latter; whereas the rules which apply to an adverse proceeding under a commission, cannot be any guide to the court in construing the terms of a deed executed between the parties. The commission was done away, and the parties were placed in a new situation; since the creditors obtained the security of three solvent persons for a certain definite sum; a security which they could not have had under the commission. The bills in question were either accommodation bills, or drawn for value in the hands of the acceptors, in either of which cases the Defendant has violated his agreement to leave the Plaintiff in full possession of his estate. If they were accommodation bills, a debt has been created against the estate of the Plaintiff, which would not have existed if the acceptors had not been called upon, and if on the other hand they were drawn for value, payment of those bills by the acceptors is a discharge of a debt which they owed to the Plaintiff's estate. Besides the Defendant has committed a fraud on the other creditors, who expected to be put upon an equal footing with him, and who perhaps might not have executed

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executed the deed if they had supposed that he was to receive twenty shillings in the pound on any of his debts.

Adair and Palmer Serjts. in support of the rule. It is clear that under the bankrupt laws, the great object of which is to establish an equal division among the creditors, the Defendant would be allowed to retain what he has received to the amount of 20s. in the pound; *Ex parte Wildman*, 1 Atk. 109.: now the deed in question being substituted in their place, he ought to be entitled to the same advantage. The object of this deed is the mutual benefit of the creditors and the insolvent; the latter is instantly put in the situation which he might hope to attain, after a long delay, under the bankrupt laws; the former have the payment of a certain sum secured to them, in consideration of which they agree to release all demands upon the bankrupt, though not on any other persons. Indeed, should the estate of the insolvent produce more than 8s. in the pound, still the creditors bar themselves by this deed, from claiming any further sum out of that estate. This question depends upon two clauses in the deed, *viz.* that of release and that of restitution; now release to the drawer is no release to the acceptor, who by his acceptance of the bill has made himself the original debtor; *Dingwall v. Dunster, Doug.* 247.: and by the clause of restitution nothing could be restored to the bankrupt but what he had lost by the transfer to the assignees, of which the securities in the hands of the Defendant were no part. Admitting, however, the acceptor to have been discharged, the money in question has been received by the Defendant to his use, and not to that of the Plaintiff.

EYRE Ch. J. The only difficulty in my mind is, whether Stock has a right to bring this action for money had and received to his use. I am inclined to think, that on the true construction of the deed of composition, it must be considered as a discharge of every body; the consequence of which is, that the acceptors of the bills who have been called upon, have paid the money in their own wrong, and ought to recover it back. A solution of this difficulty was attempted by my brother *Le Blanc* in arguing on the relation between the acceptor and the drawer. If the bills were accommodation bills, the acceptor would have a right to call on the drawer; it seems, therefore, that the money received by the Defendant was in fact part of the estate of the Plaintiff, and ought under the deed to be returned to him in order to enable him to satisfy the acceptor: if the bills were not

not accommodation bills, the money received by the Defendant was more immediately the estate of Stock, because he has so much less in the acceptors hands in consequence of the transaction. This case has been argued on an analogy which does not in fact exist; *viz.* between the effect of this deed, and the proceedings under a commission of bankruptcy, though a commission happened to be the foundation of the agreement. A commission is a transaction between creditors only, the estate of the bankrupt is completely taken out of him, and he has no interest but in the actual surplus of that estate after all debts paid: here, on the other hand, the insolvent had an interest in every thing beyond 8s. in the pound. It is on the ground of uncertainty that the rule has been allowed to prevail, that a bill holder may prove against every body who is a party to the bill, for until the dividends are ascertained, it is impossible to know what satisfaction he will have. But here a certain liquidated sum is given, and the creditor thinks it for his interest to consider the whole as the debt of the drawer, and to accept 8s. in the pound as a satisfaction: this is the substance of the instrument; by this the debt is discharged and gone, and the effects are absolutely released. Suppose that the Plaintiff had paid 20s. in the pound, there can be no doubt, but that he would have become the purchaser of the bills, and would be entitled to take them out of the hands of the holder and use them according to the relation in which he might stand to the acceptor. If it be so on payment of 20s. in the pound, can we distinguish the present case from that? The creditor has thought fit to accept 8s. in the pound in lieu of 20s., and though this could not be pleaded on a parol agreement, yet on a deed it may, and the discharge is as effectual as if 20s. in money had been paid. I am therefore of opinion that this case has been argued on the ground of an analogy which does not exist, and admitting every thing advanced to be true with respect to the rule where debts are to be proved under different commissions, yet even there if a party has proved his debt under one commission, and taken a dividend, he cannot prove the whole debt under another. The business is generally managed by not taking a dividend under any commission till the debt has been proved under all, and there is no possibility of setting the matter right, but by calling the parties to an account. Here the debt is not only reduced to 8s. in the pound, but actually discharged, so as to entitle the Plaintiff to stand in the

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place of the Defendant. The difficulty however recurs whether it does not lie with the acceptor to bring this action, and whether the money in dispute must not be considered as his: if my Brothers can satisfy me on this point, I shall have no hesitation on the rest of the case.

BULLER J. The nature of the contract and deed on which this question arises decides the case. *Stock* was indebted to several persons: the creditors sued out a commission, but for the purpose of avoiding expence; and getting as great a satisfaction as possible, they came to an agreement that *Stock* should provide security for 8*s.* in the pound, and that they would give up the remainder of their debts and make him a new man. If there was any sort of surprise by one creditor upon another, it is no new case to say that it was a fraud: one creditor is induced by another, to come into the composition, and they all agree by deed to take an equal dividend; now this is not effected by one of them reserving a secret advantage. It is said that the Defendant has not taken more than 8*s.* in the pound out of *Stock's* effects, but I say that he does get the surplus out of *Stock's* effects. These were part of the bills which by agreement the Defendant was to restore, they came into his hands from *Stock*, and were to be delivered back to him, on payment of 8*s.* in the pound. By the mode of stating this account, the Defendant decides against himself; to give a foundation for the argument, he should have pursued this method: he should have said, I have 1113*l.* 19*s.* 5*d.* due to me on one account, and 1107*l.* 5*s.* 5*d.* on another; he should not have added the two together, but should have claimed a dividend on the former sum only, and have treated the latter as a debt satisfied by the bills which he held in his hands; by not doing this he has committed a fraud on the rest of the creditors, who expected to be put on an equal footing with him, and had a right to know his situation. Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not, I do not know: it was formerly considered that it could not, and was so decided in *Coke* (a). I think however that there are some late cases to the contrary, and one in particular in Lord *Mansfield's* time, who said, that if a party chose to take a smaller sum, why should he not do it? There may be circumstances under-

(a) *Pinnel's case*, 5 Co. 117. where it was held that payment of a lesser sum at the time and place mentioned in the condition cannot be a satisfaction for a greater; but if paid before the day or at another place may. *Vide also Chamber v. Ware*, Sir. 43.

which such an agreement might not only be fair but advantageous; it may be of more importance to a man to take 10s. to-day than 20s. to-morrow. If we look to the deed it is impossible to say that the word "bills" in the deed does not extend to the bills in this case. What other bills are there? Supposing (as we must) that these bills were drawn for value, until the acceptors pay them they are indebted to the drawer to their amount, and if *Stock* pays 8s. in the pound in satisfaction of his debt, is he not to have the bills in order to recover from the acceptors? If indeed they were accommodation bills only, then unless they are to be delivered up to the Plaintiff, the acceptors will be bound to pay, and will have an action against *Stock*, who will thus be called upon for more than 8s. in the pound. Whichever way the case be stated, the Defendant has received more than 8s. in the pound.

HEATH J. I am of the same opinion, and shall bottom myself on the clear intention of the parties. There were three descriptions of persons parties to the transaction, *viz.* the debtor, the creditors, and the sureties; and it was agreed that the creditors should take 8s. in the pound in discharge of all debts. Now in order to induce the sureties to guarantee the payment of the 8s. in the pound it was necessary to take an account of the Plaintiff's property; in taking which account they must have considered what was in the hands of the acceptors of the bills. If the acceptors were intended to hold the money subject to further demands, the sureties would not have guaranteed to that extent. It is said that the Defendant has only pursued his remedy against third persons; but in my opinion he has taken a double remedy against the estate of *Stock*; 1st, against his effects in his own hands, and 2dly, against his effects in the hands of the acceptors. My Lord's observations have satisfied me that there is no analogy between this case and the proceedings under a commission of bankruptcy. But a question has been made whether this action will lie for money had and received to the use of the Plaintiff. Now what is a bill of exchange? It is nothing but an order on the drawee to pay so much out of the effects of the drawer in his hands, and the acceptance is evidence in law that the acceptor has such effects, if therefore a person receives any thing out of those effects, he receives what belongs to the drawer who may recover it in this form of action.

ROOKE J. I am of the same opinion.

Postea to the Plaintiff.

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FISHER v. McNAMARA.

A prisoner after judgment against him may, notwithstanding the allowance of a writ of error, be charged in execution.

THE Plaintiff in this case was proceeding after the allowance of a writ of error to charge the Defendant, then in custody on mesne process, in execution.

This was opposed by Marshall Serjt.

But the Court said that if the Defendant were not charged in execution she would be supersedeable (*a*), and that the Plaintiff therefore was only doing that which for his own security he was obliged to do.

(*a*) But a Plaintiff may shew for cause against a supersedeas issuing, that the Defendant has sued out a writ of error before the end of the two terms limited by the practice of the Court. 2 Will. 38o. *Garratt v. Mentall, C. B. R. H.* 26 Geo. 3.

June 18th.

FULHAM v. BAGSHAW.

The Court will not allow a Plaintiff to sign judgment because the Defendant refuses to pay for half the paper books delivered to the Judges; this case being within the rule.

Hil. 35 Geo. 3.

MARSHALL Serjt. opposed the arguing a demurrer in this case on the ground that the Defendant's attorney had refused to pay for two of the paper books delivered to the Judges according to the rule of Court. *Mich. 6 G. 2. Imp. C. B.* 352. ed. 4.

The Court at first doubted, but upon inquiry finding that the Court of King's Bench (*a*) had considered a subsequent rule (*b*) (which had also been adopted in this court) ordering that no judgment should be signed for non-payment of issue money, as controlling the former rule, said they should follow the same construction, and held the money to be paid for the paper books as coming within that rule, and therefore refused to allow judgment to be signed without argument.

Shepherd Serjt. contra.

(*a*) *Fuller v. Osborne, 6 T. R. 477.*

(*b*) *Hil. 35 Geo. 3.* It is ordered, that after the first day of next term no judgment shall

be signed for non-payment of issue money, but that the issue money shall remain to be taxed as part of the costs in the cause.

1798.

QUICK & UX. v. SIR W. STAINES KNT. SHERIFF.

THIS was an action of trover for household goods brought by the husband and wife in right of the wife as executrix of her former husband *M'Pherson*, under the following circumstances: *M'Pherson* died about nine months previous to the action being brought, having made his widow his executrix, who continued in possession of his goods, and about three months after his death married the Plaintiff *Quick*. During those three months she used the goods as her own, and after her marriage with *Quick* the goods were treated by them both as his. The Defendant having taken these goods in execution at the suit of a person who was a creditor both of *M'Pherson* and of *Quick*, but who claimed them upon the present occasion to satisfy the debt of the latter, received notice from the Plaintiffs that the effects which he had taken were the unadministered goods of *M'Pherson*.

EYRE Ch. J., before whom the cause was tried at the *Westminster* fittings after *Easter* term, being of opinion that a *devastavit* had been committed on the part of the executrix, by putting the effects of *M'Pherson* into the hands of her second husband, directed a nonsuit against the Plaintiffs, with liberty to move to set it aside and enter a verdict in their favour. Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Shepherd Serjt. now shewed cause. It cannot be denied that the executrix has such a property in the goods of her testator as to enable her to sell and make a good title, though she may render herself liable for a *devastavit*. Now the executrix in this case having first treated the goods as her own, and the Plaintiff *Quick* having since her marriage with him treated them as his, is sufficient to shew that she had given them up to him, which must have the same effect as if she had sold them. If by her conduct she did not make these goods her own, what period of time can be stated at which the effects of a testator in the hands of an executor are to be considered as converted to the use of the executor? In *Farr v. Newman*, 4 T. R. 621. the Court seemed to consider that if any thing had been done by the executor to raise such a presumption the goods might be considered as his own: and Lord *Kenyon* was of opinion, that till the contrary be shewn the goods must be considered as the property of him in whose handst they are found. Here perhaps it may be contended, that a claim is made by the

June 18th.
2 Espin. N. P. C.
651.
8 Ver. Jun. 21.
If an executrix
use the goods of
her testator as
her own, and
afterwards
marry, and then
treat them as the
goods of her hus-
band, she shall
not be allowed
to object to their
being taken in
execution for her
husband's debt.

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executrix, but it must be remembered that she claims again her own acts.

Le Blanc and *Clayton* Serjts. in support of the rule. An executor does not take an absolute property in the goods of his testator but such an one only as will enable him to fulfil the duties of his office. In this case *McPherson* died, leaving his widow in possession of his goods in that house in which they had lived: she never removed them, but they continued in the same house until after her intermarriage with another person. At what period did she take possession of the goods as her own? An executor may convey to another the goods of his testator for money, and inasmuch as third persons cannot know in what manner that money is applied, creditors cannot follow the goods. But an executor cannot devise the goods of his testator, nor are they forfeited by his attainder, nor are they liable to the bankrupt laws. *Horne v. Jemmett*,³ *Burr.* 1369. If an executor pay the debts of his testator to the amount of the value of the goods, he continues in possession of them as becoming the purchaser. The old form of the action of trespass by an executor against a person who takes the goods of the testator, shews the law; for the *gravamen* is "the delaying of the execution of the will," *F. N. B.* 87. E. In *Roller v. Pinter, Cro. Eliz.* 291. a term in the hands of the husband in right of his wife as administratrix, was held not to be extendible for his debt, though it had continued in his hands and had never been granted; and in *Farr v. Newman*, though the alteration of property was as great as in this case, yet it was held that the goods were not liable for the husband's debt. Indeed it would be hard if the act of marriage alone were to make the executrix liable as a *devastavit*. It was said by the Court in *Farr v. Newman*, that the sheriff had any doubt to whom the goods belonged, he should have summoned a jury *de proprietate probandâ*; and though it has been contended that the present case differs from that, since that was an action between two creditors, whereas this is an attempt by the executrix to disaffirm her own acts, yet that argument is answered by the opinion of Lord Kenyon, *4 T. R.* 64 viz. that it is too late to say that the possession of goods is in itself conclusive evidence of property.

EYRE Ch.J. I was not aware at *nisi prius* that the case of *Farr v. Newman* had been decided in so solemn a manner, though if it had, it would have made no other difference than to make it a wish that this case should be put upon the record. The first objection

jection to the authority of that case, as applying to this, arises from the form of the action, which was not the same as here; and the second, from the difference of the parties. It is one thing whether a creditor shall insist that an executor has been guilty of a *debauchavit*, and another, whether the executor shall take advantage of his own wrong, and justify his own misconduct by saying that the goods are not his but his testator's. The case of *Whale v. Booth* and others, cited 4 T. R. 625. is directly in the teeth of *Farr v. Newman*. I think however that this question may be decided on a principle which will leave the latter case altogether untouched, *viz.* that the executrix had taken the goods to her own use. On that ground I shall have no difficulty in deciding: but we will look further into this question.

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 QUICK
 V.
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Cur. adv. vult.

On the next day the opinion of the Court was delivered by EYRE Ch. J. We have looked into the case of *Farr v. Newman* and the authorities there cited, and the Court adheres to the opinion, that this nonsuit ought not to be set aside. We proceed on a ground which does not at all interfere with the case of *Farr v. Newman*; as to which I shall say nothing either one way or the other. The ground of our decision is that originally taken, *viz.* that a *debauchavit* has been committed by the executrix, who before her marriage had converted the goods. I allow that it would be hard (as it was argued) if the mere act of marriage had worked a *debauchavit*; and we do not hold that. But when in consequence of the marriage the effects were permitted to come into the hands of the husband and to be used by him, then at least, if not before, a clear *debauchavit* was committed, since that conduct amounted to a conversion of the goods. We think that where the executrix herself or her husband have converted the goods, it does not lie in the mouth of either of them to say that they are not the property of the husband, in a case between the executrix and one of his creditors. We do not say any thing with respect to the question, ~~as~~ between creditors of the original testator pursuing the assets with legal diligence, or the executrix in respect of those assets, and creditors of the executrix or the husband of the executrix, whether they shall or shall not have a preference against a creditor of the executrix. That question will be fit to be considered when it arises, and then we shall decide it, with a proper respect for the case of *Farr v. Newman* contrasted with the case of *Whale v. Booth*, 4 Term Rep. 625 n. before Lord Mansfield,

4 Term. Rep.
625. n.

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with the other cases to be found in the books upon the subject, and with the general principles of law relating to the goods of testators and intestates, and the nature of a claim made on their representatives in respect of those goods. It may be a difficult question, but it is not now to be touched.

Per Curiam,

Rule discharged.

June 19th.

7 T.R. 535.
8 T.R. 576.
7 Vez. Jun. 473.

If *A.* receive money of *B.* to the use of *C.*, it may be recovered by *C.* in an action for money had and received, though the consideration on which *B.* paid it be illegal.

Quer. Whether the case would be varied if *A.* were a party to the contract between *B.* and *C.*?

FARMER v. RUSSELL and Another.

ASSUMPSIT against the defendants, who were common carriers. The first count in the declaration was on a special agreement not to deliver the goods in question without receiving the money for them; the other counts were general, among which was one for money had and received. At the trial it was proved on the part of the Plaintiff that he had agreed to carry certain goods called medals, and to deliver them to a person at *Portsmouth*; that they were taken by the carriers *on delivery*, the meaning of which term is, that the carriers are to receive 2d. in the pound for commission, and are not to deliver the goods without receiving payment for them. It appeared, however, that these medals were in fact counterfeit halfpence sent to *Portsmouth* for the purpose of being distributed among the sailors: but no other knowledge of the contents of the boxes in which these goods were packed could be brought home to the Defendants, than what might be implied from the circumstance of one of the boxes having been accidentally opened in the presence of a clerk of the Defendants, who saw the counterfeit halfpence (*a*). The Defendants had received money from the person at *Portsmouth*, and had accounted to the Plaintiff for the whole of it except 13*l.*, the subject of the present action. *Rooke J.*, before whom the cause was tried at the *Guildhall* sittings after *Easter* term, told the jury, that if the counterfeit halfpence were sent as an imposition on the public, the contract between these parties was illegal, and no action could arise out of it, and that the carriers did not seem to him wholly exempt from crime, as they appeared to be acquainted with the nature of the goods. Accordingly a verdict was found for the Defendants, with leave to move to set it aside, and enter a verdict for the Plaintiffs, if the Court should be of that opinion.

(*a*) This fact was stated in the report of Mr. Justice *Rooke*, but some doubts were afterwards expressed by him with respect to its having been proved.

A ru-

A rule *nisi* for that purpose having been obtained by *Cockell Serjt.* on the authority of *Tenant v. Elliott, ante*, p. 3.

Adair and Shepherd Serjts. now shewed cause. Admitting that there was no direct evidence to prove that the Defendants knew the nature of the goods committed to their care, still in legal construction this was not money received to the use of the Plaintiff. This case may be distinguished from that of *Tenant v. Elliott*, as the contract was founded not only on *malum prohibitum*, being contrary to act of parliament, but also on *malum in se*, being contrary to common honesty, and a fraud on all mankind; whereas the contract in *Tenant v. Elliott* was only made illegal by positive law. A Plaintiff must recover on his own strength, not on the innocence of the Defendant. If *A.* pay money into the hands of *B.* to be paid to *C.* for the assassination of a particular person, or as the price of perjury, it will never be contended that *C.* can recover it: it is not sufficient to shew that *B.* ought not to keep the money, but it must also be shewn that *C.* is entitled to receive it. It is to be observed that in all the cases where money paid on illegal contracts has been recovered back, the actions have been brought in disaffirmance of the contract, as in *Jaques v. Withy*, 1 H. Bl. 65.; whereas here the action is brought in support of the illegal transaction. Neither were the Plaintiffs in those cases in *pari delicto*, whereas here the Plaintiff was a principal in the fraud. If this money had been paid into the hands of a banker on a general account, it might not have been competent to him to object to the grounds on which that money was paid: but in the present case the money was paid for the specific purpose of completing the illegal contract, and was received in the course of carrying it into effect.

Cockell Serjt. contra. This might have been a different case if the contract had been executory, for there the Defendant would have stood in the situation of a stake-holder: but here the party who had a right to object to the contract has affirmed it by his own act. Suppose money to be paid into the hands of the Plaintiff's clerk, for the Plaintiff's use, shall he be allowed to say "this money was paid into my hands for your use, but being the consideration of an illegal contract, I shall put it into my own pocket." The authority of *Tenant v. Elliott* is decisive, and cannot be distinguished in principle from this case.

EYRE Ch. J. If I could be satisfied that the Defendant in this case ought to be considered as insuring the performance of an illegal contract, I should be of opinion that a demand necessarily connected with an illegal contract, and tending to facilitate the execution

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8 T.R. 576.

execution of it, would be vitiated by that contract; but my doubt is, whether he can be so considered. The question therefore is, whether the Defendant is competent to state the transaction with the party at *Portsmouth*, and make any use of it? It seems to me that the Plaintiff's demand arises simply out of the circumstance of money being put into the Defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumption* in law arises, and on that an action on the case may be maintained. It was on this ground that the Court proceeded in *Tenant v. Elliott*, and I find myself under a difficulty in making any distinction between that case and the present. The illicit trading there was as much *malum in se* as the transaction here. For it was held in the Exchequer-chamber, in *Camden and others v. Anderson*(a), that violating a prohibition of a species of commerce in which the interest of the country was concerned, was not merely *malum prohibitum* but *malum in se*, and I am well satisfied with that decision. Now *Tenant v. Elliott* had the same foundation as *Camden and others v. Anderson*, viz. an insurance on trade to the *East Indies* carried on by a subject of this country in violation of the *East India* Company's charter. In *Tenant v. Elliott*, the Court were of opinion that though the insurance was clearly void, yet that the broker into whose hands the money was paid had nothing to do with the illegality of the contract. The obligation on him arose out of the fact of the money having been received by him for the use of a third person, which created a promise in law to pay; and it was well said by my Brother *Buller*, that even the man who had paid over money to another's use could not dispute the legality of the original consideration. The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the Court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the Plaintiff and the man at *Portsmouth*, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the Defendant was not himself a party to the original contract, for

(a) *ante*, 277.

there

there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, *viz.* that he was lending his assistance to an infamous traffic. In that case the rule *melior est conditio possidentis* will apply; for if the contract with him be stained by any thing illegal, the Plaintiff shall not be heard in a court of law.

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BULLER J. I think the knowledge and participation of the Defendant is not made out by the evidence reported; nor indeed if it had been, would it have made any difference in the case of an action for money had and received, which is not founded on the illegal contract, but on a ground totally distinct from it; *Walker v. Chapman*, cited *Dougl. 471.* ed. 3. It seems to me that all the confusion in this case has arisen from the Plaintiff having proved too much at the trial. He should have shewn that the Defendant had received so much money to his use, and it was immaterial whether the money were paid on a legal or an illegal contract. The cases come up to that point; *Alcincrook v. Hall*, 2 *Wilf.* 309., which was the case of money lent to pay a bet at a horse-race, and *Faikney v. Reynous, Burr.* 2069., of money lent to pay differences in a stock-jobbing bargain, where the Defendant was privy to the transaction. And it has been said that if money be lent to pay differences in the Alley, the party lending it with full knowledge of the purpose to which it is to be applied may recover. Here the money having been paid by another to the Plaintiff's use, the illegal contract is out of the question. I am unable to distinguish this case from that of *Tenant v. Elliott*.

HEATH J. I am of the same opinion. In *Tenant v. Elliott*, the Defendant was employed as agent to negotiate an illegal insurance, and was privy to the whole transaction, and yet the money there was considered as coming into his hands, to the use of another person. I look upon the matter in the same light as if the money had been paid into the hands of a banker who could never be allowed to say that it was paid in on an illegal consideration. In the case of a stake-holder, the Court would inquire into the transaction; but the distinction is, that whether the consideration be good or bad, a man may recover his own money, though not that of another person. The case of *Barjeau v. Walmley*, *Str.* 1249., where a party was allowed to recover (a) money lent to another to game withal, is very strong.

(a) *Vid. etiam, Wetenball v. Wood, coram Lord Kenyon, Espin. Cas. N. P. 22.*

ROOKE J.

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ROOKE J. I agree with my Lord and my Brothers, that there ought to be a new trial in this case, though I cannot agree with them in the reasons on which they are inclined to direct it. The Plaintiff is to recover on his own merits, not on the demerits of the Defendant. If he has no merits, or if he discloses a case of foul fraud on his own part, I think he ought not to be heard, however great the demerits of the Defendant may be. The Plaintiff in this case is concerned in a traffic not merely forbidden, but fraudulent and indictable; *viz.* the uttering counterfeit tokens, and counterfeit halfpence. He endeavours to carry on this traffic with complete security to himself as to payment. He knows he cannot recover payment as for goods sold and delivered, and therefore contracts with the Defendants to carry the goods, and to engage to receive the money for them on a commission of 2d. in the pound. By these means he secures himself as to the payment, and the Defendants become his agents to sell for ready money; they are instruments of fraud in the hands of the Plaintiff, and being such instruments, they behave dishonestly to their principal: shall then the Court assist such a principal to recover his money out of the hands of his agents? or shall it not rather say, if you will employ agents in a fraudulent transaction, you must rely on the fidelity of your agents, for the Court will not assist you? A distinction has been taken between the Defendant's being privy to the fraudulent transaction, and not being privy to it. I thought at the trial that there was evidence of the Defendants' knowledge, and I told the jury so. In that, I probably made some mistake; because neither my own note, nor the memory of counsel, supply me with a fact, which yet makes an impression on my memory; *viz.* that some of the goods were ill-packed, and the packages broken, so that the Defendants must probably have known the contents. To clear up this matter, if the Court think the point of law in the Plaintiff's favour (supposing the Defendants to have no knowledge of the contents of the packages), it may be right to send the parties to a new trial. But on the best consideration I can give this case, I do not think that this fact, found one way or the other, can vary the ground on which the cause should be decided. The ground on which I form my opinion is this; that the Plaintiff ought not to be heard to make a claim in a court of justice, founded on a transaction for which he ought to be indicted. He disclosed the whole

whole transaction by his own witnessies in establishing his own case, on the 1st count, against the Defendant for not receiving ready money; and having disclosed it, I think the Court ought not to shut its eyes against it, but to notice the transaction as fully as if disclosed in a declaration or on a special verdict. The distinction as to the knowledge or ignorance of the Defendant, if allowed, will produce this strange consequence; that if he be innocent, he shall be answerable in this action; but if guilty, he shall be free: his innocence shall work a loss to him, his guilt shall be his indemnity. This is so monstrous a doctrine, that though it may be technically accounted for, on the ground of mutual privy in a foul transaction, I cannot assent to it, if I can discover a principle, by which it may be rejected. I cannot agree that a Plaintiff shall be heard, if he alone is party to a foul fraud: and that he shall be rejected, only when the Defendant is as bad as himself, and when both are mutually concerned in the fraud. I think that a man who has been guilty of an indictable offence ought not to have the assistance of the law to recover the profits of his crime; and that whether his agents be innocent or criminal, privy or not privy, his claim against those agents is equally inadmissible in a court of law. In this case the Plaintiff does not come into court with clean hands; he alleges his own turpitude, and is indictable for his fraud. Suppose a Plaintiff to state in his declaration "I have beaten A. according to the terms of my agreement with B., B. has lodged the money he contracted to give me, in the hands of the Defendant, and the Defendant refuses to pay it over to me;" I think the Court would reject his demand. *Tenant v. Elliott*, is not precisely in point; it proceeds on a general principle, to which the circumstances of that case may be applicable: but to which the circumstances of the present case form an exception. It is not there stated whether the circumstances which support the objection were proved on the part of the Plaintiff, or on the part of the Defendant. The assured did not by that contract secure himself at all events against loss, though he broke the law by ordering the insurance in question. Neither the broker nor he could enforce payment from the underwriter: whereas here is a contract to secure the Plaintiff against loss in a fraudulent traffic, and the Defendants (whether privy or not to the fraud) are the agents to secure him by dealing for ready money only. If the Plaintiff will employ an agent in such a transaction, he must rely on the honesty of his agent, and I think the law ought not to assist him.

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EYRE Ch. J. If it be possible to mix the original transaction with the contract, on which the action is brought, I agree with my Brother *Rooke* in all his conclusions. (a)

Rule absolute for a new trial. (b)

(a) *Vid. Steers v. Laffley*, 6 T. R. 61. *Boob v. Hodgson*, 6 T. R. 405.

(b) The Defendants afterwards paid the money into Court.

Vid. tamen Sullivan v. Greaves, Park Inf. 8.

 June 19th.
 3 *Bof. & Pull. 6.*

The Court has no power to discharge a Defendant out of execution, on the ground of a commission of bankruptcy having since been sued out against him by the Plaintiff.

M'MASTER v. KELL.

A DAIR Serjt. on a former day obtained a rule, calling on the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the warden of the *Fleet*, as to the execution wherewith he stood charged at the suit of the Plaintiff in this action, on the ground of the Plaintiff having since sued out a commission of bankruptcy against him. The facts were these. The Defendant was charged in execution by the Plaintiff in *Trinity term 1797*, for 609*l.*; on the 22d of *May* last a commission of bankruptcy issued on the petition of the Plaintiff, under which the Defendant was declared a bankrupt; the Plaintiff was the only person who proved under the commission, and was chosen sole assignee.

Clayton Serjt. shewed cause, and contended that a petition to the Great Seal had never yet been held to be a satisfaction of a debt, and though in *Burnaby's case*, 1 *Sr. 653.* charging a debtor in execution was held such a satisfaction to a creditor, as to prevent him from petitioning on that debt (a), yet that the converse did by no means follow.

Adair Serjt. in support of the rule, cited *Ex parte Ward*, 1 *Atk. 153.* and *Ex parte Lewes*, 1 *Atk. 154.*

EYRE Ch. J. Suppose the Lord Chancellor should think fit to supersede the commission, then we shall have discharged the debtor, because a commission has issued against him, and the Lord Chancellor will have superseded the commission because the party has been charged in execution. There is no instance of such an application to a Court of law, and I am not disposed to make a precedent. Indeed I do not know that the principle has ever been recognized as one upon which a Court of law can act; it is much fitter for the Court of Chancery to interfere, since that Court

(a) *Vid. etiam, Cobbe v. Cunningham*, 8 T. R. 123.

may

may either supersede the commission, or direct the bankrupt to be discharged out of custody. I wish it to be understood that this rule is discharged, on the ground of a want of jurisdiction in this Court.

Per Curiam,

Rule discharged.

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SANGSTER v. BIRKHEAD.

REPLEVIN of goods and chattels.
Avowry for rent in arrear, and issue thereupon.

One *Woodward* and his wife being seised in fee of a house in *London*, by lease, bearing date 29th of *March 1777*, demised it to the Defendant for a term of twenty-one years, which expired at *Lady-day 1798*, at the yearly rent of 4*l.* deducting the land-tax. The Defendant demised the house for eighteen years and ten months from the 1st of *May 1779* to one *Robert Sugden* at the yearly rent of 6*l.*, also deducting the land-tax. In this lease amongst the other usual covenants on the part of the lessee, there was one to make "all needful and necessary reparations" and amendments whatsoever," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the lessee to insure. The lease was assigned by *Sugden* for a valuable consideration, and after several mesne assignments came on 19th of *May 1787* to the present Plaintiff; in *May 1795* a fire having happened in the adjoining house, by which that house was entirely consumed, and the roof of the Plaintiff's injured, the owners of the scite of the adjoining house being desirous to rebuild, had the party wall examined by four surveyors, and delivered a certificate to the Plaintiff according to 14 *Geo. 3.* c. 78. s. 38. that the wall was, by the opinion of the said surveyors, condemned as decayed and ruinous. It was accordingly rebuilt and the Plaintiff called upon for a moiety of the expence. This he paid, and deducted out of the rent due to the Defendant, who distrained for rent in arrear to that amount.

This cause came on to be tried before *Rooke J.* at the *Guildhall* fittings after *Easter* term, when the surveyors gave in evidence, that they had condemned the wall as ruinous and decayed; that it was probably built soon after the fire of *London*; that they could not decide whether it were originally ill-built, or had received some injury from external violence, but that it was not injured

June 20th.
10 *Easf.* 233.
If the lessee of a house at a rack-rent underlet it at an advanced rent, he is liable to contribute to the expences of a party-wall, built under the 14 *G. 3. c. 78.*; nor is the operation of the statute at all varied by any covenants to re-pair entered into between the landlord and his tenant.

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injured by fire. A verdict was taken for the Defendant in order to ascertain the sum due, subject to the opinion of the Court.

Adair Serjt. having on a former day obtained a rule nisi for setting aside that verdict and entering one for the Plaintiff,

Shepherd Serjt. now shewed cause. The first question is, whether the Defendant can be considered as the owner of the improved rent within the 14 Geo. 3. c. 78. s. 41. (a)? the second, whether under the terms of the lease the Plaintiff was not bound to repair the wall at his own expence, or whether he is relieved from the performance of his covenant by 14 Geo. 3. c. 78. (b) First, the object of the act was to throw the burden on those persons who derive a benefit from the improved rent; such as the lessee of a ground rent on a building lease: it was never intended to apply to persons who having taken a lease at a rack-rent, afterwards underlet at a rent somewhat higher. The Defendant is not the owner of the improved rent, but of an increased rent only. It seems to have been the opinion of Lord Kenyon and Buller J. in *Southall v. Leadbetter*, 3 T. R. 458., that persons who take leases at a small rent, and afterwards improve them so as to create a new estate, should be liable. But a person who takes a house in the city of London at a rack-rent, and afterwards underlets to one who wants to come into his business, and therefore gives a better rent for the house, is not the owner of the improved rent within the meaning of the act; if he were, there might be six different owners of the improved rent of the same house. In *Peck v. Wood*, 5 T. R. 130. the distinction taken, was between the improved rent and the ground rent. Secondly, supposing the Defendant to be the owner of the improved rent within 14 Geo. 3. c. 78. still the Plaintiff is bound by his covenant to repair, and is not exempted from the performance of those covenants by the act. [The Court said they could not meddle with that question, as the Legislature certainly never meant to incumber itself with the covenants which parties might make with each other.] (b)

Adair contra was stopped by,

(a) By 14 Geo. 3. c. 78. s. 41. It is enacted, that the person at whose expence any party-wall shall be built, agreeably to the directions of that act, shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building in the proportion therein mentioned. That the first builder shall leave at the adjoining building an account of the sum to be paid by such owner; whereupon

it shall be lawful for the tenant or occupier of such adjoining building to pay such proportionable part of the expence to the first builder, and to deduct the same out of the rent which shall become due from him to such owner or owners under whom he holds, until he be reimbursed the same.

(b) Vid. tam. *Barrett v. Duke of Bedford*, 8 T. R. 60.

EYRE

EYRE Ch. J. I dare say that the leading object of the Legislature was to make the owner of the improved rent liable, as opposed to the ground landlord. But though that may have been the leading object, yet the expressions of the act being such as they are, we must deal with them as well as we can, and find an owner of the improved rent in all cases, though there should be no ground rent reserved. Here the original landlord made a lease for twenty-one years to a person who again underlet the premises. Who then is the person to be considered as the owner of the improved rent, but the man who on all the subsisting leases has the best rent? But, whether he be the person or not, I have much doubt, as the question now stands, if the Defendant can avail himself of the objection which he has taken. I think that it was intended by the Legislature that the tenant should pay a moiety of the expence to the person building the wall, and reimburse himself by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on such other persons as he may think liable. That appears to me the best construction for putting the business in a practicable shape. I should incline to that opinion, even if it were made out that the covenant on the part of the tenant to repair, included this case: for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages should be settled in an action of covenant, than to break in on the rules established by the statute. It is easy to see, that this is an ill-penned law, and its meaning is left uncertain; but in the present case I do not know how to determine, who is the owner of the improved rent, if it be not the person who takes the best rent. Possibly it may be said that *Woodward* and the Defendant should pay in certain proportions; let them however settle that in such actions as they may think fit to bring. I know no way of executing this law, if we enter into all the derivative claims of different landlords (a). If the tenant pays the money, let him reimburse himself, and leave the other parties to dispute among themselves.

BULLER J. I agree in opinion with my Lord, and think his construction of the act clear and intelligible. There are three parties in this business, the man who built the wall, the tenant, and the tenant's immediate landlord. The owner of the adjoining house pursued the directions of 14 Geo. 3. c. 78. which gave him a right to call on the Plaintiff for a moiety of the expence; that being settled, how does the case stand between the tenant and

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 SANGSTER
v.
TICKHEAD.
(a) *Boardmore v. Fox*, 8 T. R. 214.

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SANG FLE
v.
BIRKHEAD.

his landlord? I agree that we must consider whether the landlord be the owner of an improved rent: but in this case he has an improved rent, since he receives more than the person of whom he took the premises. And if the landlord has the improved rent he certainly is liable, though there be only one year of the term to come. As to the question, whether the expence can be apportioned, that does not arise here; but if any thing could be found to warrant an opinion thrown out by Lord *Manfield* in *Stone v. Greenwell* (*a*), that the parties might be liable to a rateable proportion in some cases, it would tend much to the advancement of justice. The building a party-wall is certainly a great improvement to the premises, and every person interested in the fee and receiving a benefit from it ought to contribute.

HEATH J. I think the construction which has been put upon this statute is the true and necessary construction. The Legislature seems to think that there must be an owner of an improved rent in respect of every house; and we need not look further than the landlord immediately above the tenant who pays.

ROOKE J. I do not know how any other construction can be put upon this act, than that which has been suggested. The words of the statute are, that "it shall be lawful for the tenant" "or occupier of such adjoining building or ground to pay one" "moiety, &c.;" this Plaintiff was the tenant, it was therefore lawful for him to pay, and he was to reimburse himself by deducting the rent due from him to his landlord, if that landlord was the owner of the improved rent; but not if he was only the owner of the ground rent.

June 20th.
7 *E. & A.* 565.
13 *E. & A.* 100.
2 *Bif. 15th Pull.*
472 *S. P.*
2 *Tours* 43.
7 *Vex.* Jun. 345.
Vide 9 *Vex.*
Jun. 249.
13 *Vex.* Jun. 30.

A sale of lands, though by auction, is within the statute of frauds. If the abandonment of a contract be made the ground of an action, it is not competent to the Plaintiff to shew that a contract has existed and been abandoned, without proving the specific contract. ~~the~~ ~~not~~ sum only, without interest, can be recovered in an action for money had and received.

Rule absolute

(*a*) *Micb. T. 24 Geo. 3. B. R.* referred to 3 *T.R.* 461.

WALKER v. CONSTABLE.

THIS was an action on the case. The first count in the declaration stated that the Plaintiff had contracted with the Defendant for the purchase of an estate, had paid a deposit of 860*l.*, and had incurred a considerable expence in examining the title; that in consideration of the premises, and that the Plaintiff and Defendant had agreed that the said contract should be at an end, ~~and~~

the said intended purchase be abandoned, and that the Plaintiff would receive back his aforesaid purchase money, the Defendant undertook to pay interest on the deposit money from the time of its being advanced to the time of its being repaid, and also the costs and expences of examining the title. There was also a count for money had and received.

Plea: general issue.

At the trial of this case before *Eyre Ch.J.*, at the *Guildhall*ittings after *Easter* term, the Plaintiff not having produced a written contract in support of his declaration was nonsuited, on the ground of its being a contract for the sale of lands within the statute of frauds. (a)

Adair Serjt. on a former day obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict be entered for the Plaintiff, contending, first, that sales by auctions were not within the statute [But the *Court* said that the cases (b) on that subject only applied to sales of chattels]; secondly, that it was competent to the Plaintiff to prove that a contract had existed and been abandoned, without producing the specific contract in evidence.

The *Court*, however, were of opinion that the contract itself must be shewn, before it could be proved to have been abandoned: but granted a rule to shew cause on the suggestion of *BULLER J.*, that the Plaintiff might perhaps be entitled to recover interest under the count for money had and received.

Adair having again mentioned the case this day,

The *Court* were of opinion, on the authority of *Moses v. Macfie*lan

2 *Burr.* 1005. that in an action for money had and received the Plaintiff could recover nothing but the net sum received without interest.

Per Curiam,

Rule discharged.

(a) 29 Car. 2. c. 3. s. 4.

Johnson, coram Eyre Ch. J. Esp. Cas.

(b) *Vid. Simon v. Metivier or Motivier, N.P.* 101, 651.

1 *B. 399. 3 Burr. 1921. and Stanfield v.*

June 21st.
16 Ver. Jun.
425.

STEEL v. RORKE Administratrix, &c.

Assumpsit for goods sold and delivered to the Defendant's intestate. Plea: Judgments and bonds outstanding. Repli-
cation: That the judgments were not at the time of suing out the
in the directions of 4 & 5 W. & M. 2. 20. cannot be pleaded by an executor or
an action on simple contract.

An outstanding
judgment against
a testator or in-
testate, not dock-
eted according
to the directions of
the Statute of Limitations.

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v.
RORKE.

writ docketted and entered according to the provisions of 4 & 5 W. & M. c. 20. Rejoinder: "Protesting that the said replication, and the matters therein contained, are not sufficient in law for the Plaintiff to have or maintain his action thereof against the Defendant, nevertheless that the Defendant before and at the time she so pleaded her said plea as aforesaid, had notice of the records of the said several judgments so obtained as aforesaid, and each and every of them in the said replication mentioned, being in the said court of our said Lord the King, before the King himself, in manner and form as she the Defendant hath above in those respects in pleading alleged, and which still remain, and each and every of them remains in the said court of our said Lord the King, before the King himself, at Westminster aforesaid, in their and each of their full force and effect, not reversed, annulled, set aside, or in any wise paid off or satisfied." To this there was a general demurrer and joinder thereto.

Heywood Serjt. in support of the demurrer. The case of *Hickey v. Hayter*, administratrix, 6 T. R. 384. which puts judgments not docketted on a footing with simple contract debts, is decisive in favour of the Plaintiff. The only argument which can be advanced in support of this rejoinder is, that the object of the statute was to insure notice to executors and administrators of judgments in force against them; if therefore that notice be obtained by any other means it will be sufficient. The words of the statute however are positive "that no judgment not docketted and entered shall have any preference against heirs, executors, and administrators, in the administration of their ancestors', testators', or intestates' effects." The plea states that the Defendant is bound to pay debts which he is not bound to pay; for there is no lien on the effects created by the judgments; the executor, therefore, cannot take advantage of them as if there had been. Besides, the docketting is not required for the sake of executors and administrators only, but of all persons, such as the creditors or residuary legatee who may be interested in knowing what judgments there may be outstanding against the estate.

Shepherd Serjt. *contrd.* Before the statute, executors and administrators were bound to retain assets in their hands for the payment of all outstanding judgments, though they had received no notice of any being signed; for it was their duty to search for them. The only object of the statute, as appears by the preamble,

amble (a), was to remedy the difficulty which they lay under in discovering such judgments. The Legislature, therefore, after directing the form in which the docket and entry shall be made, enacts that executors and administrators shall not be bound to take notice of any judgments unless docketted and entered accordingly. But in this case the only question is, whether the administratrix having received actual notice of the judgments, is not bound to give them a priority. Lord Kenyon, in *Hickey v. Hayter*, says, that if the Defendant had had notice of the judgment debt, perhaps she would have been warranted in paying it before the bond debts. The words of the statute only say that such judgments shall not have any *preference* against executors and administrators; but if they receive actual notice, surely they may be at liberty to set it up. At any rate as this is the first time that the question has arisen, and the Defendant, in her plea has stated more outstanding specialty debts than the assets will pay, the Court will allow her to amend by striking out the judgments which are not docketted.

EYRE Ch. J. I think on principle that the rejoinder is bad; but I have no objection to allowing the Defendant to amend. The statute declares that judgments not docketted shall have no preference against heirs, executors, and administrators. Why are executors and administrators allowed to plead outstanding judgments? because they have a preference, and it is for that reason that they are allowed to plead them, in order to prevent *a defraudavit*. But it is said that an executor is at liberty to set up judgments not docketted. Certainly he may pay them, and when he has paid them, they are like other simple contract debts, which when paid may be given in evidence under the title of *plene administravit*. But if the law has allowed executors and administrators to plead debts of a superior nature to debts of an inferior nature, only because they are bound to pay them; when the law has said that certain debts shall not be debts of a superior nature, unless certain ceremonies are observed, they will no longer stand in that class, and there is no reason why they should be set up against a demand on simple contract. The case is too clear to admit of a question.

(a) Whereas great mischiefs happen and come as well to persons in their life-times, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees, by judgments entered upon record in Their Majesties courts at *Westminster* against the persons Defendants, by reason of the difficulty there is in finding out such judgments, &c.

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 STREET
 o
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v.
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BULLER J. My Brother *Heywood* stated the substance of a plea of outstanding debts very accurately: it is this, "I the Defendant am bound to pay other debts before I pay you the Plaintiff;" and the only question is, whether he be bound to pay or not? But no man ever heard of a plea in an action on simple contract, stating that the testator owed so much more on simple contract, and therefore the Defendant meant to give a preference to others before he paid the Plaintiff. If then the Defendant was not bound to prefer, the rejoinder is bad. My Brother *Shepherd* seems to consider the statute in a more limited way than the words will bear. The object of the Legislature was more general. The preamble states that mischiefs happen as well to persons in their lifetimes, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees. This case is clear on the words of the statute, and the decision in the King's Bench is directly in point. Mr. *J. Grose* and Mr. *J. Lawrence* were there of opinion that the situation of judgments not docketted was reduced to that of simple contract debts, and I agree with Lord *Kenyon* that no notice is sufficient but that which the statute has required.

HEATH J. I am of the same opinion. The object of the statute was not only to protect executors and administrators, but also creditors: for there cannot be a greater instrument of fraud than a judgment not docketted. If a party means to act honestly he should follow the directions of the act.

ROOKE J. I am of the same opinion.

Leave given to strike out such part of the plea as relates to the judgment in question, and to state what is really due on the bonds, but not on the penalties.

June 21st.

TINGREY, Widow, v. BROWN.

The administratrix of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to 4 G. 2. c. 28. without taking out administration *de bonis non*; even though the tenant has attorned to her.

himself,

himself, "by reason whereof he the said *Francis* then and there became entitled to the said demised premises, subject to the said lease;" that he died intestate, and that the Plaintiff took out administration of his effects, "by virtue whereof she became, and was, and is entitled to the said remainder of the said demised premises for the said term, which is yet unexpired, and so demised to the Defendant as is aforesaid; of all which premises the Defendant afterwards (to wit) on, &c. at, &c. had notice, and then and there attorned to and became the tenant to the Plaintiff for the residue of the said term." It then stated that after the expiration of the Defendant's term, and notice in writing to quit, he continued to keep possession, whereby, &c.

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TINGREY
v.
BROWN.

To this count there was a general demurrer and joinder.

Williams Serjt. was to have argued in support of the demurrer, but *Le Blanc* Serjt. being called upon by the Court to begin on the part of the Plaintiff, contended that as this was not a debt due to the testator, it was not necessary for the Plaintiff to clothe herself with the character of administratrix *de bonis non*. That it did not appear but that all the debts had been satisfied by *Francis Tingrey*, in which case this lease would have passed to his personal representative the Plaintiff. He observed also that the Defendant admitted by the demurrer that he had attorned to the Plaintiff, and therefore as this statute says that the landlord shall bring the action, that landlord must be the person to whom the tenant has attorned.

EYRE Ch. J. Is not every thing unadministered which has not been reduced into the actual possession of the executor, and converted by him? Most certainly in any case in which the Plaintiff means to make title, she must take out administration *de bonis non*. It is not incumbent on those who resist, to shew that there are debts of the testator unsatisfied, but the Plaintiff must shew that there are no debts, and that the executor possessed himself absolutely in his own right.

Per Curiam,

Judgment for the Defendant.

KNOWLYS and Another v. READING.

June 27th.

The Defendant was arrested by original in the King's Bench; but before declaration was removed by *habeas corpus* to the Fleet, and a declaration in the Common Pleas was delivered.

If a Defendant
be arrested by
process of K.B.
and removed by
habeas corpus to
C.B., he may put in and justify bail in either court.

x 4

After



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READING.

After which the Plaintiff's attorney received a notice of bail being put in, and of their intention to justify on the 26th in the King's Bench; but on the 25th he received another notice of bail being put in in this court, and of an intended justification here on this day.

Runnington Serjt. now opposed the justification, and urged that the bail ought to be put in in the King's Bench, as there was no writ in this court; and contended that if they were received here and an action were brought on the bail-bond, the Defendant could not plead *comperuit ad diem*.

But the Court were of opinion, that as the Plaintiff was at liberty to declare in either court, if bail were offered here they ought to be received.

Bail allowed.

TRINITY TERM, 38 Geo. 3.

11 Feb. 1792.

IT IS ORDERED, that upon all Writs of *Distringas* returnable on the last day of Term the Plaintiff shall be at liberty, at the rising of the Court, to move to increase issues on the *alias* or *pluries Distringas*, to be issued thereupon on the following day, in case no appearance shall have then been entered. And also that in like Cases where a *Distringas* shall be returnable on the last day of Term and Issues thereupon levied, the Plaintiff shall be at liberty, at the rising of the Court, to move for leave to sell such Issues to pay the Costs of such *Distringas* or *Distringas'*. And it is further Ordered, that where a Rule to bring in the Body shall expire on the last day of Term, the Plaintiff shall also be at liberty, at the rising of the Court on that day, to move for an *Attachment* for not bringing into Court the Body of the Defendant, and that such *Attachment* may be accordingly issued on the following day, provided Bail shall not then be perfected, or the Defendant rendered in discharge thereof.

JAS. EYRE.
F. BULLER

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

DRISCOL v. BOVIL.

Nov. 9th.

1 Nov. Rep.
184. ante 200.

THIS was an action on a policy of insurance on three-fourths of the ship *Timandra*, from *Lisbon* to *Madeira*, from *Madeira* to *Saffi*, and from *Saffi* to *Lisbon*; being the insurance on the round voyage mentioned in the case of *Drifcol v. Paffmore*, *ante*, p. 201.

At the trial before *Eyre Ch. J.* at the *Guildhall* fittings after *Trinity* term, the same facts appeared in evidence as in *Drifcol v. Paffmore*, with the addition of a letter written by the Plaintiff on the 18th of *August* from *Lisbon*, (after his return from *Madeira* to that place,) to his broker in *London*; which contained the following passage: "Should the merchant here, who chartered the vessel, insist on her proceeding to *Saffi* to fulfil the charter, I want to know if it is agreeable to the underwriters that the vessel may proceed to complete her voyage, as by recent account the risk is not so great. I expect your immediate answer."

Answered by him that he thinks the policy at an end. At the instance of the charterer the captain does proceed to *C.*, and on his return from thence to *A.* the ship is captured. Held that the voyage insured was never abandoned.

Insurance on a voyage from *A.* to *B.*, from *B.* to *C.* and from *C.* to *A.* The voyage from *A.* to *B.* is performed, but that from *B.* to *C.* being unavoidably prevented, the ship returns to *A.*; from whence the captain writes to his broker in *London*, requesting him to obtain the opinion of the underwriters as to his proceeding directly to *C.* if the charterer should insist upon it; and is an-

" fwer

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" fewer respecting their determination on this business. I hope " they will be satisfied that the return of the vessel to this port is " much more in favour of them, than of me or any other person " concerned. By the next packet that fails from hence I shall be " able to inform you whether she is to proceed to *Saffi* or not; " but the opinion of the underwriters either one way or the other " is necessary." The broker in his answer to this letter gave his opinion that the policy on the round voyage was at an end, and informed the Plaintiff that he had effected a new policy on the voyage from *Saffi* to *Lisbon*. A verdict was found for the Plaintiff.

Le Blanc Serjt. on this day moved for a rule to shew cause why a new trial should not be had, and contended that although the deviation made by returning to *Lisbon* might possibly be justified by necessity (*a*), still that it appeared by the Plaintiff's letter that the original object of the voyage had not been kept constantly in view: for it long depended on the will of the charterer whether the vessel should proceed or not; and that the Plaintiff himself was manifestly desirous of abandoning the voyage.

BULLER J. This certainly is not a verdict against law. The question before us is a mere question of fact. This motion seems to have been made on two grounds; first, that the deviation was not justified by necessity, though little reliance had been placed on that; secondly, that the voyage insured was abandoned. Now whether the deviation were justified by necessity or not, rests on one plain fact; namely, that on receipt of the intelligence of some *Moorish* cruisers being off *Saffi*, the crew refused to proceed. What then could the captain do but return? As to the abandonment of the voyage, it seems to me that the Plaintiff has acted with great prudence and circumspection, but that he has never abandoned. The terms of his letter expressly prove that he had not formed any conclusion as to what he should do, and that he did not think himself at liberty to form one. He asks the broker, what the underwriters will say, if the merchant shall still insist on his completing the voyage. Does he then determine to proceed at any hazard? On the contrary he wishes to know the sentiments of the underwriters, and reserves to himself the power of determining what part he shall take. I think the verdict clearly right.

(*a*) Vid. *Lavabre v. Wilson*, Doug. 290. "voyage of necessity directly, in the shortest space where Lord Mansfield says "that it "and most expeditious manner."
"is incumbent on the insured to pursue a

HEATH J. I am of the same opinion. As to the necessity of the deviation there can be no doubt. And with respect to the last point, if the Plaintiff intended to abandon, that intention should have appeared in clear terms, or in unambiguous conduct. He seems to have taken all necessary caution, first by consulting the charterer and then the insurer, but it does not appear that he ever came to the determination of abandoning the voyage.

ROOKE J. I cannot distinguish between this case and that of *Driscoll v. Paffmore*; and though I at first entertained some doubts on the latter, I am now perfectly satisfied that the decision was right. The letter given in evidence in this case does not prove any intention in the Plaintiff to abandon; for it appears that he considered himself liable to continue the voyage, provided the charterer should insist upon it.

Le Blanc took nothing by his motion.

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DRISCOL
v.
BOWLS

No. 9th.
8 T. R. 16. 17.
as to insurable
interests.
14 Feb. 529.
593.

A being indebted to *B*, without any order from him consigns goods to *C*, to be held for *B*, and indorses the bill of lading to *C*; resolved that *B* had an insurable interest in the goods so consigned.

HILL and Another v. SECRETAN.

ACTION on a policy of insurance on goods on board the *San Bernardo* from *St. Andero* to *London*. The declaration averred that the Plaintiffs were interested to the amount insured.

At the trial before *Eyre Ch. J.* at the *Guildhall* fittings after *Trinity* term, it was proved that the house of *De la Torre* in *Spain* consigned 29 bags of wool to the house of *Dubois and Son* in *London*, and indorsed the bill of lading to them; but that with the bill of lading came a letter annexed, directing *Dubois and Son* to hold 15 bags for a house at *Halifax* and the remainder for the Plaintiffs at *Exeter*, which was the subject of the present insurance. It appeared also that *De la Torre* was indebted to the Plaintiffs in the sum of 500*l.*, but that they had given no orders for these goods. The ship was captured by the *French*, but afterwards retaken. The jury found a verdict for the Plaintiffs.

Shepherd Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a new trial be had, insisting that the Plaintiffs had no insurable interest in the goods as the bill of lading was not indorsed to them, and as *De la Torre* would still be liable for his debt to the Plaintiffs, if the goods should not reach them.

But the Court were clearly of opinion that as the goods were consigned to *Dubois and Son* to hold for the Plaintiffs, the former were

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1798.

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v.
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were to be considered as trustees for the latter from the time the goods were put on board the ship; that the circumstance of the Plaintiffs being creditors of *De la Torre* raised a good consideration for the consignment, and therefore no doubt could be entertained of the Plaintiffs having an insurable interest. (a)

Shepherd took nothing by his motion.

(a) Lord *Kenyon*, in the case of *Anderson v. Edie, Guildhall fittings, Trinity term 35 Geo. 3. Park. Insur. 432.* a. was of opinion that a creditor has an insurable interest in the life of his debtor, since the means by which he is to be satisfied may materially depend upon it, and at all events the debt must in some degree lessen the security.

Nov. 14th.

10 East. 547.
11 East. 630.
14 East. 529.
Pof. 346.
2 New Rep.
313.

A. having consigned a cargo to *B.* and drawn bills on him to the amount of it, in favour of *C.* his general agent, sends these bills together with the bills of lading to *C.*, desiring him to transmit them to *B.* "that *B.* may have an opportunity of insuring :" he also draws a bill for 300*l.* on *C.*, which is accepted; *B.* refuses to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct. In an action by *C.* stating himself in the first count to be the agent of *A.* and averring interest in him : in the second averring interest in himself : held, first, that the policy was good within 28 C. 3. c. 56: secondly, that *C.* had an insurable interest to the amount of 300*l.*

WOLFF and Others v. HORNCastle.

THIS was an action upon the case on a policy of insurance, dated the 9th of January 1797, and made by the Plaintiffs by their names and firm of Messrs. *Wolffs* and *Dorville*, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, upon goods on board the ship *The Fahrund's Wharf, Peter Nicolay Mohr*, master, at and from *Fahrund* to *London*, at a premium of six guineas per cent. The Defendant underwrote the policy for 200*l.*, there was a total loss by perils of the sea. The first count of the declaration averred that the insurance was made by the Plaintiffs as the agents of one *Jochum Brink Lund*, and for his use and benefit, and that the Plaintiffs at the time of making thereof were persons residing in *Great Britain*, and did effect the policy as such agents, and that the style and firm of Messrs. *Wolffs* and *Dorville* inserted in the policy was at the time of making thereof the usual style and firm of dealing of them the Plaintiffs, and that *Jochum Brink Lund* was interested in the goods to the amount insured. The second count averred the interest in the goods to be in the Plaintiffs, and that they made the said insurance for and on their own account.

The Defendant paid the premium, viz. 12*l.* 12*s.*, into court upon a plea of tender, which was admitted.

The cause was tried at the *Guildhall* fittings after *Michaelmas* term last, before *Eyre*, Ch. J. when a verdict was found for the Plaintiffs with 187*l.* 8*s.* damages, and 40*s.* costs, subject to the

opinion

opinion of the Court on a case, stating, That *Jochum Brink Lund* was a merchant resident at *Fahrifund* in *Norway*, and had contracted with certain persons in *London*, carrying on trade under the firm of the *Cudbear* Company, to supply them with a quantity of moss: that the Plaintiffs were the general agents of the said *Jochum Brink Lund* in *London*: that the said *Jochum Brink Lund* having, on the 12th of November 1796, shipped 574 sacks of moss at *Fahrifund* in *Norway*, on board the said ship called the *Fahrifund's Wharf*, consigned to the said *Cudbear* Company in *London*, and upon their account and risk transmitted to the Plaintiffs the invoice and bill of lading of the same, in a letter as follows: "The ship *Fahrifund's Wharf* is now loading with a cargo of moss; she will be ready to sail in the course of eight or fourteen days, and usually takes in fifty-six tons; please to hand the inclosed to the *Cudbear* Company, that these friends may have an opportunity to secure themselves by insuring the moss cargo, the season being so far advanced:" that the goods were by the said bill of lading to be delivered to the said *Cudbear* Company or order; that on the 10th of December 1796 the said *Jochum Brink Lund* drew a bill of exchange on the said *Cudbear* Company for the amount of the said cargo, 1112*l.* 8*s.* 2*d.*, at three months sight, in favour of the Plaintiffs, and remitted the same to the Plaintiffs to procure acceptance thereof, and to place to his credit; and at the same time advised the Plaintiffs of his having drawn on them for 300*l.*, which bill for 300*l.* was by the Plaintiffs accepted and afterwards paid: that the *Cudbear* Company, after having received through the hands of the Plaintiffs the bill of lading and invoice of the said cargo, and having the said bill for 1112*l.* 8*s.* 2*d.* presented to them by the Plaintiffs for acceptance on the 9th of January 1797, refused to accept the said bill or take to the cargo, or insure the same, and returned the bill of lading and invoice to the Plaintiffs: that the Plaintiffs thereupon caused the above insurance to be made on the said 9th of January 1797 without any order so to do, and on the next day by letter informed their correspondent *Jochum Brink Lund*, that the *Cudbear* Company had refused to accept the bill or take to the cargo, or make any insurance, and that they the Plaintiffs had made such insurance as aforesaid. On receipt of which letter the said *Jochum Brink Lund*, on the 28th day of January 1797, wrote a letter to the Plaintiffs, containing, among other things, as follows: "it is very well you have taken the precaution to insure the moss cargo,

1798.

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WOLFS

v.

HORNCASTLE.

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1798.

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" cargo, hoping the *Cudbear Company* at the arrival of the ship
 " will repay the premium ; in the mean time I have credited you
 " the amount of it in your account. On the 1st instant Captain
 " P. N. Mohr sailed again, but on account of stormy and con-
 " trary winds was obliged to take harbour on the west coast of
 " Norway in *Rasvog*, without any damage, intending with the
 " first fair wind to proceed on his voyage ; not doubting at his
 " safe arrival you will settle it with the *Cudbear Company* in such
 " a manner that they, without any further objection, will take and
 " pay the cargo as *per invoice*. In want of complying with the
 " above I shall be necessitated to commence a law-suit against the
 " said company, to which I will furnish you with the necessary
 " documents." That the said *Jochum Brink Lund* was at the time
 of the said insurance being effected indebted to the Plaintiffs in
 1400*l.* and upwards : that the said ship the *Fahrund's Wharf*,
 with the said cargo on board, was afterwards lost by perils of
 thesea in the voyage insured from *Fahrund* in *Norway* to *London*.

The question referred for the opinion of the Court was, whether the Plaintiffs were entitled to recover ? if not, a verdict to be entered for the Defendant.

Le Blanc Serjt. for the Plaintiffs. Two objections are made to the Plaintiffs' recovery. To the first count which avers the interest to be in *Lund*, and that the Plaintiffs made the insurance as his agents and for his use and benefit, and that at the time of making it they resided in *Great Britain* and effected the policy as such agents, the Defendant objects that the policy was not made by the order of *Lund*, nor by the Plaintiffs as his agents, and therefore is void under 28 Geo. 3. c. 56. To the second count, which avers the interest to be in the Plaintiffs, he objects that they had no insurable interest, or, what is stronger, that they made the insurance on *Lund's* account, and not on their own. 1st, It appears that the Plaintiffs were the general agents of *Lund* in this country, it was therefore their duty to take care of his interest. No express order was given to the Plaintiffs by *Lund* to insure on his account, because he thought that the consignees, the *Cudbear Company*, would take to the cargo and insure. This appears by his letter, in which he directs the bill of lading to be handed to the *Cudbear Company*, that they may have an opportunity of securing themselves by insurance. On the *Cudbear Company* refusing to take to the cargo, the Plaintiffs insured for *Lund* their principal, and immediately wrote him word of their having so done : *Lund* directly approved of their conduct,

conduct, and adopted their acts. Previous to 25 Geo. 3. c. 44. it was complained of as a great inconvenience that policies being made in blank, no name appeared by which any judgment could be formed of the character of the persons interested in the risk. By that statute it was therefore enacted, that no policy should be made without inserting the name or names of the person or persons interested therein, or the name or names of the person or persons who should effect the same as agent or agents of the person or persons interested, &c. After this act, many policies were effected in the names of agents, without its being stated that they acted as agents, and great inconvenience having arisen from this circumstance, it was found expedient to repeal that statute by 28 Geo. 3. c. 56. the object of which is, that the name of some person residing in *Great Britain* shall appear on the policy, without requiring that he shall be described as agent. Then do not the Plaintiffs come within the meaning of this act? They are persons residing in *Great Britain*; they are the general agents of the person interested; they are the persons to whom the consignees returned the bill of lading; they are the persons to whom the owner of the cargo intimated the propriety of making an insurance, and whose acts in having insured he afterwards approved. The 28 Geo. 3. having been made in order to remove the inconveniences occasioned by 25 Geo. 3. the Court will not put a strict construction on it, so as to defeat the Plaintiffs' title to recover. ~~adly,~~ If it were necessary for the Plaintiffs to have recourse to the second count, their right to insure on their own account might easily be established, since, on receiving the bill of lading from the owners, they accepted a bill for 300*l.* which created a lien on the goods to that amount.

Shepherd Serjt. for the Defendant: 1st, The material question is, whether the Plaintiffs have effected a policy within 28 Geo. 3.? It is clear that this case is not within the words of that statute. The persons whose names are to be inserted are, the person interested, the consignor, or the consignee (none of which characters apply to the Plaintiffs); the person residing in *Great Britain* who shall receive the order, or the person who shall give the order for effecting the insurance. Now this case states that the Plaintiffs had not received any order at the time when the policy was effected; the question therefore is brought to this, whether the subsequent approbation of *Lund* be equivalent to a previous order? But whether the policy were well or ill effected must depend on the facts existing at the time when the policy was made; and as the Plaintiff had

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had then received no order they made an unauthorized insurance. *Lund* might have resolved to litigate the question with the *Cudbear* Company, and have disowned the act of the Plaintiffs, in which case they would have been entitled to a return of premium, no risk having been run. If a subsequent acquiescence be held tantamount to a previous order, it will be in the power of any person residing in *England* to effect a policy without order, and afterwards to set up an acquiescence, or demand a return of premium, according as the risk may turn out. I contend that the agent must have such an order at the time of insurance as will bind his principal. Now in this case, if the Plaintiffs had averred that they effected the policy by order, they could not have supported the averment. There is no doubt that subsequent acquiescence in the case of a general agent may be evidence of a previous order, but the fact of a previous order is absolutely negatived by this case. 2dly, It is expressly stated in the case that the Plaintiffs did not insure on their own account, but that they wrote to *Lund* to inform him that they had effected a policy on his account, and he agreed to credit them for the premium. However, had this not been the case, they could have had no insurable interest, for *Lund* desired them to hand over the bill of lading to the *Cudbear* Company, and drew on the Company in favour of the Plaintiffs to the amount of the goods. The Plaintiffs therefore accepted the bill for 300*l.* drawn by *Lund* upon them on the faith of the consignees accepting the bill drawn for the value of the goods, not on the faith of the goods arriving.

BULLER J. This is an action on a policy of insurance made on goods on board the *Fahrund's Wharf* at and from *Fahrund* to *London*. The policy is made in the names of *Wolff* and *Dorville*, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all. This policy in its frame is very much like those which we used to see some years before the legislature interposed in the 25th *Geo. 3.*, only I remember that the words "as interest may appear" were then usually added. The ship sailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* transaction; and no fraud has been suggested; a loss has happened, and the underwriter now chooses to say, that for want of a strict compliance with the 28 *Geo. 3.* he shall be excused from paying the money. Time was, when no underwriter would have dreamed of making such an objection: if his solicitor had suggested a loop-hole by which he might escape,

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he would have spurned at the idea. He would have said is it not a fair policy? have I not received the premium? and shall I not now, when the loss has happened, pay the money? This would have been his answer, and he would have immediately ordered his broker to settle the loss. If however the Defendant can bring his case within the statute, he has a right to do so, and we are bound to give him judgment. But has the Defendant brought his case within the meaning of the statute? has he even brought it within the words of the statute? And even if he had brought it within the words and not within the meaning, I should be clearly of opinion for deciding against him; and in so doing I should follow the directions of the statute, which in the last clause says, "every policy and policies of insurance made and wrote contrary to the *true intent and meaning* of this act, shall be null and void." The objection is that the statute requires the names or style and firm of dealing of the persons interested, or the names or style and firm of the consignors or consignees of the goods insured, or the names or style and firm of the persons residing in *Great Britain*, who shall receive the order for and effect the policy, or of the persons who shall give the order or directions to the agents immediately employed to negotiate or effect the policy to be inserted in the policy. Now it is material to go back to a time previous to the passing of this statute, in order to see what was the real meaning of the Legislature. My Brother *Le Blanc* very properly went into a review of the 25 Geo. 3. though that act has been since repealed. By putting the two acts together we may learn the true spirit and meaning of the last; what it was those who introduced it wished to be effected; and I might add from recollection what it was they professed. The inconvenience recited by 25 Geo. 3. was the making policies in blank, and therefore it was enacted, that where they were made by persons residing in *Great Britain*, the names of the persons interested should be inserted therein, or the names of the person who should effect the same as agents for the persons interested, and in case of persons residing out of *Great Britain*, the name of the agent. Under this act it happened that many persons not understanding the meaning of these provisions, and not complying literally with them, lost the benefit of their policies (a). The Legislature therefore thinking that they had drawn the string too tight, recited in 28 Geo. 3. "that it had been found by ex-

(a) *Pray and Others v. Edis.* 1 Term. Rep. 313.

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"perience that great mischiefs and inconveniences had arisen to persons interested in ships and to persons using commerce, from the 25 Geo. 3. c. 44. and that it was expedient that other and more convenient provisions should be made for the regulating insurances on ships, &c. than those contained in the said act," &c. Now we are bound to say that this second statute must receive the most liberal construction that the words will bear. From the language of the two statutes, as well as the consideration that we are construing a contract *uberrimae fidei*; viz. a policy of insurance, we must avoid bearing harder upon the Plaintiffs than is absolutely necessary. Let us see then whether the Plaintiffs do or do not come within any of the descriptions of persons in the last statute. These descriptions are four: the confignor and the confignee, the person receiving and the person giving the order. It is perfectly clear that the Plaintiffs are not the confignors: but I am by no means prepared to say that they are not the confignees. It is true that the goods were originally configned to another person, but the case must be considered as it stood at different periods: though the *Cudbear* Company were clearly the confignees at first, it does not follow that they continued to be so. What is a confignee? A confignee is a person residing at the port of delivery, to whom the goods are to be delivered when they arrive there. *Lund* does not trust the *Cudbear* Company without securing himself: he therefore sends the bill of lading to the Plaintiffs, who are his general agents, in order that he may be secure of being paid for his goods. Certainly if the *Cudbear* Company had received the goods, they would have been the confignees, but they refused to receive them; then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the persons who had the bill of lading and were the general agents of the confignor? From the moment that the *Cudbear* Company refused to have any thing to do with the goods, the Plaintiffs became the confignees. If this be so, there is no objection to the policy, and I am satisfied that I do not carry this construction too far when the justice of the case is with the Plaintiffs. But there are two other characters mentioned in the statute. The next is the person who receives the order to insure. Let us see therefore whether these Plaintiffs had not an order to make insurance. The goods were originally intended for the *Cudbear* Company; but they were sent, accompanied with a letter which

2 New Rep. 291.

which stated in the clearest terms that *Lund* intended that they should be insured. The *Cudbear* Company having refused to take the goods, could the Plaintiffs, who were the general agents of *Lund*, could any man of sense read his letter, and doubt of his intentions? In giving his reasons he says that the season is so far advanced, that he does not think it safe to send the goods without their being insured. The Plaintiffs must therefore have been blind if they had not seen that it was his intention to have them insured. Then what was his interest? Why that they should be insured. It is agreed that a general agent has a right to exercise his discretion for the benefit of his principal: he must act on the spur of the occasion, and if nothing else had passed, I have doubts whether the consignor would not have been liable to pay the premium. But the Plaintiffs take the opportunity to inform the consignor of their having made the insurance, and he highly approves of their acts (a), which brings the case within the maxim that *omnis ratihabitio retrotrahitur & mandato priori æquiparatur*. I am clear therefore that the Plaintiffs were the persons who received the order to make this insurance within the description of the act of parliament. But there is still another character to be considered; the statute mentions, in the last place, the person who gives the order to make insurance. Now, in my opinion it is impossible to state a case that comes more directly within the act of Parliament than this. Who were the persons immediately concerned, who immediately employed the broker, who gave the immediate order for insurance, but the Plaintiffs? It appearing therefore that they come within the words of the act of Parliament, the case stands clear of all objections, and is in law, conscience, and justice with the Plaintiffs. With respect to the second count, I hold that the Plaintiffs had a clear right to insure to the amount of 300l., for which they were interested in the goods. My Brother *Shepherd* considers them as standing without interest in the goods, because they had only a debt against *Lund*. I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest. The case is not at all altered by the goods not having arrived. There is no more common trans-

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307.3 *B&F*, & *Pull.*
91.(a) *Vid. French v. Backhouse*, and *French v. Foulston*, 5 *Burr. 2727.*

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action in the city of *London* than to raise money on the security of a bill of lading and policy: these Plaintiffs, having advanced their money on that security, must, if the goods had arrived, have received 300*l.* out of them; the goods being lost, the policy of insurance stands in the place of them, and the Plaintiff is entitled to receive that sum under the policy. By my note it appears that the Chief Justice, when this case was first moved, delivered a clear opinion in favour of the Plaintiffs: on the whole therefore I think the case is most decidedly with them.

HEATH, J. I am of the same opinion. But as my Brother *Buller* has entered so fully into the case, I shall speak more shortly than I should otherwise have done. This statutewas made to prevent unlawful gaming. It is therefore enacted that no persons shall recover under policies of insurance, but those who have either an interest as principals, or have acted as agents. In the first place then I think that the Plaintiffs were clearly the consignees of the goods: for the bills of lading were sent to them, and they had a right to take possession. The statute also says, that if the names of the consignor or consignees be not inserted, that of the person giving or receiving the order for the insurance shall be inserted. While the ship is in safety, where is the difference whether the agent insure without order, and the principal afterwards approve of the insurance, or first receive the order and then insure? On the second count it is equally clear, that the Plaintiffs had an insurable interest. It is true that if the *Cudbear* Company had altered their minds and taken to the cargo, that the Plaintiffs would have had no interest, but if they had a contingent and reasonable expectation of interest, it was sufficient to entitle them to insure, according to what was held in *Le Cras v. Hughes* (*a*), viz. that a certain expectation of receiving property captured for the emolument of the captors, from the Crown, would give an insurable interest.

ROOKE J. I agree in opinion with my Brothers. I think that the Plaintiffs may be considered as consignees of these goods, and I also think that they may be considered as having received orders from the principal to insure, what they did having been subsequently adopted by him. But there is one ground on which I have no doubt, namely that the Plaintiffs come within the last description of persons mentioned in the statute. They are the persons who gave the immediate order, in consequence of which

(a) *E. 22 Gr. 3. B. R. Park on Insur. 269.*

the policy was effected. The act of 28 G. 3. was made to remedy the inconveniences which were experienced under the 25 G. 3. and therefore we are bound to give it a liberal construction. I think the Plaintiffs clearly entitled.

Postea to the Plaintiffs. (a)

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(a) See *Crawford v. Hunter*, 8 T. R. 13.

WEDDALL v. BERGER.

Nov. 17th.

LE BLANC Serjt. moved to justify bail, but *Runnington* Serjt. opposed the justification, on the ground of the rule to bring in the body having expired yesterday, and that the sheriff was therefore in contempt.

But the Court overruled the objection and allowed the bail to justify on the Defendant undertaking to pay the costs of the opposition. (a)

Runnington then objected to the notice, because one of the bail was described therein as of *Coppice Row*, whereas it appeared that he had only a lodging in that place where he carried on his business, but that his house was in *Southampton Row*.

The Court however held the description sufficient, saying he was most likely to be found at the place where he carried on his business; that he had been found accordingly and was a house-keeper.

Bail allowed.

(a) But the Court will set aside an attachment obtained against the sheriff after the bail has justified, with costs, though the rule to bring in the body has expired before the justification. *Thorold v. Fisher*, 1 H. Bl. 9.

MADDOCKS and Another v. BULLCOCK.

Nov. 18th.

1 *Eaf.*, 389.
10 *Eaf.*, 100.

THE Defendant in this case having been arrested, a bail-bond was taken by the sheriff; bail above were not put in, but before the return of the writ the Defendant surrendered himself; no notice however having been given to the Plaintiff of the surrender, he took an assignment of the bail-bond and proceeded against the bail.

A rule nisi having been obtained by *Cockell* Serjt. on a former day for cancelling the bail-bond and staying proceedings thereon; *Williams* Serjt. was now proceeding to shew cause against the rule,

If a Defendant surrenders himself it is a sufficient performance of the condition of the bail bond, without putting in bail. But he must give notice of such surrender.

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on the authority of *Harrison v. Davies*, 5 *Burr.* 2683, where it was held that the Defendant's surrender was no performance of the condition of the bail-bond, but that he must put in bail: however, on a question from the Court, he admitted that the above case had been overruled in *Jones v. Lander*, 6 *T.R.* 753., and *Stamp v. Milbourne*, 7 *T.R.* 122. (a), but added, that there was a difference in this case, no notice having been given of the surrender.

The Court said that as no notice had been given, the costs of the proceeding must be paid up to the present time, and with that term made the

Rule absolute.

(a) See however *Hamilton v. Wilfison*, 1 *Egat.* 383, where it was held that it is optional in the Sheriff to accept a surrender before the return of the writ.

Nov. 29th.

WILLIAMS, Executor of ELIZABETH BREEDON, v. BARTHOLOMEW.

If A. tenant for life subject to forfeiture, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, a quietus in B.'s favour and receiving the rent in C., his executor may, shewing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B.

COVENANT for rent. The declaration stated that by indenture dated the 2d February 1789, E. Breedon demised certain premises to the Defendant, to hold from the 29th of September 1788, for the term of twenty-one years, determinable at the decease of E. Breedon, at the yearly rent of 130l.; that E. Breedon died on the 30th October 1793, having made the Plaintiff her executor; and that on the 29th of September 1793, five years rent amounting to 650l. became due from the Defendant to E. Breedon in her lifetime. Breach, that Defendant had not paid this sum to E. Breedon in her lifetime, or to the Plaintiff since her death.

Pleas. 1st, That the Defendant in the lifetime of the said E. Breedon, to wit, on the 29th of September 1793, paid to the said E. Breedon the sum of 650l. being the amount of five years rent of the said term in the said declaration mentioned, ending on that day according to the form and effect of the said indenture, and the Defendant's covenant therein; concluding to the country. 2d, That the premises in question were settled on E. Breedon by way of jointure, at the time of her marriage with S. Breedon, as to the use of the said E. Breedon, for her life, and so long as she should continue sole and unmarried, from and after the death of the said S. Breedon, remainder to his right heirs; that on the 24th of November 1776, S. Breedon died, and that on the 5th of November 1786, E. Breedon intermarried with W. Williams the father of the present Plaintiff, whereupon her interest in the premises determined; And this, &c. therefore, &c. Replication,

Replication, taking issue upon the first plea, and traversing the marriage with *W. Williams*, stated in the second plea; and on this also issue was joined.

This case came on to be tried before *Heath J.*, at the *Berkshire* Summer assizes at *Abingdon*, when it appeared that the premises were settled on *E. Breedon* as stated in the second plea; that after the death of *S. Breedon* the clandestinely married *W. Williams* at the chapel of the *Savoy*; but continued to receive the rent for some years, until Dr. *Breedon* the remainderman being informed of the marriage, and that she had forfeited her estate thereby, claimed the rent of the Defendant, who accordingly paid it to him for the five years in question, with the knowledge and acquiescence of *E. Breedon*. It was proved in answer to the second plea, that at the time of the intermarriage of *E. Breedon* with *W. Williams*, he had another wife living. A question being raised, whether these facts would support the first issue, *Heath J.* was of opinion that they would not, and accordingly under his direction a verdict was taken for the Plaintiff, but if the Court should be of opinion that payment by the Defendant to Dr. *Breedon* under the above circumstances proved the first issue, then a verdict on that issue to be entered for the Defendant.

A rule nisi having been obtained for this purpose on a former day,

Le Blanc and *Shepherd* Serjts. now shewed cause. The only question here arises on the first issue, it having been clearly proved under the second, that the marriage of *E. Breedon* with *W. Williams* was void. The payment in this case was made to Dr. *Breedon* under a mistake; not as agent to *E. Breedon*, nor under the idea of her having directed it. Had Dr. *Breedon* been steward to *E. Breedon*, the payment might then have been considered as made to her: but, this was an adverse payment to a person who claimed the rent as his own upon false grounds. If tenant in fee make a lease and die, and *A. B.* enter and receive the rents before the heir at law is aware of his title, the tenant shall not defend himself in an action for rent brought by the heir at law, by saying that he has already paid the rent to *A. B.*

Williams Serjt. for the Defendant. It is true that payment of rent by the tenant to a person who claims adversely without the knowledge of the party having the right to it cannot be supported. But *J* contend that the circumstances of this case amount to evidence

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dence to be left to a jury, that the rent was paid by the direction of *E. Breedon*, which would make it a payment to herself. The payment to Dr. *Breedon* under an idea on all sides that he was entitled to the rent, amounts to an agreement on the part of *E. Breedon*, that it should be paid to him. Where a mortgagee or obligee agrees that the mortgagor or obligor shall pay the interest to a scrivener, it is a good payment, though he has neither the custody of the mortgage, nor the bond. *Whitlock v. Waltham*, 1 *Salk.* 157. Suppose *E. Breedon* had said to the Defendant, "I have forfeited the estate, and you must pay the 'rent to Dr. *Breedon*,'" the payment would have been protected: now if her conduct amount to a confirmation of the payment, it must have the same effect, according to the maxim that *omnis rati-habitio retro-trahitur et mandato priori æquiparatur*. This cannot be called a voluntary payment by the tenant, for if Dr. *Breedon* had distrained and avowed in replevin for rent in arrear, what plea in bar could the tenant have set up? Nor was it a payment by mistake, having been made with the knowledge of the lessor, to whom all the fault and laches must be imputed.

BULLER J. If money be paid to *A.* by the direction of *B.*, it is a good payment to *B.*; but I can never agree that if money be paid to *A.* simply with the knowledge of *B.*, it will be a payment to *B.* Suppose that one disseises another of an estate and continues in possession of the rents and profits with the knowledge of the disseisee, will any body say that the disseisee shall not recover against the tenant? Knowledge will not do, there must be consent, direction, and authority. Here there clearly was no order. This poor woman thought that she was not entitled to the rent: Dr. *Breedon* therefore obtained it in spite of her, in consequence of her persuasion, that she was not entitled. If she allows Dr. *Breedon* to receive the rent under the idea that she has no right, how can we conclude from that circumstance, that she would have done the same if she had been apprised of her right? It has been argued, that if Dr. *Breedon* had distrained and avowed in replevin, the tenant could have made no answer; but I see no difficulty in that. Every tenant is bound by his attornment; the Defendant might have pleaded that he did not hold as tenant Dr. *Breedon*; and if Dr. *Breedon* had said "You have attorned to me;" the Defendant might have answered "I did that by your misrepresentation, who claimed as remainder-man;" and might have shewn, that Mrs. *Breedon* was still alive and entitl—

If Mrs. *Breedon* had ordered the Defendant to pay the money to Dr. *Breedon*, the payment could never afterwards have been questioned. The tenant in that case would have had nothing to do with any transaction between Mrs. *Breedon* and Dr. *Breedon*, be the title what it might: if he had obeyed the order of Mrs. *Breedon*, it would have been a payment to her agent. The next question then is, whether there be any thing in Mrs. *Breedon's* conduct which amounts to a confirmation of the payment? Now, to constitute that, some act must appear to have been done by her with knowledge of her own situation. Here a right to the rent was insisted upon by Dr. *Breedon*; and Mrs. *Breedon*, being deceived both in point of law and fact, acquiesced in the payment of that rent to another to which she was entitled. Her right, therefore, stands as it did before Dr. *Breedon*, whose claim was clearly adverse, received any rent at all.

HEATH J. I continue of the opinion which I held at the trial. It does not seem to me that the Defendant was under any peculiar difficulty. He might have had recourse to a bill in equity to be indemnified. What was said by my Brother *Shepherd* struck me very much. Suppose a lease made, and a person claim as heir at law, to whom the rent is paid; and afterwards the true heir at law is discovered, will it be said that he shall not recover?

ROOKE J. The tenant having taken a lease from Mrs. *Breedon*, must answer for the defect of rent. She made a mistake, and thought her title at an end when it was not; the mistake was afterwards discovered, and her executor is therefore now warranted in recovering the rent from the tenant.

Rule discharged.

WILLIAMS, Executor of ELIZABETH BREEDON, v. BREEDON. Nov. 19th.

TRESPASS. The first count was for *cutting down*, felling, throwing down, grubbing up, prostrating, and destroying the timber-trees and other trees, and the underwood and coppices of the underwood of *Elizabeth Breedon* deceased, in her life-time, of the value of 300*l.*, and the bushes and boughs thereof coming, taking, and carrying away, and converting to the use of the Defendant.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given applicable to the bad count also.

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The second count was for seizing, taking, and carrying away the goods and chattels, *viz.* wood, timber, underwood, bushes, and boughs of the said *Elizabeth* deceased, in her life-time, of the value of other 300*l.*

Plea. Not Guilty.

At the trial before *Heath* J., at the *Berkshire* Summer assizes at *Abingdon*, it was proved that the Defendant (the remainderman mentioned in the last case, and who had acted on an idea that *Elizabeth Breedon* had forfeited her interest in the premises by a supposed marriage with one *William Williams*) *cut down* the wood in question: and the several sums of money for which he sold the different parcels being ascertained; the jury found a verdict for the Plaintiff with general damages to that amount, but if the Court should be of opinion that the action was not maintainable, then a verdict to be entered for the Defendant.

However, *Williams* Serjt. on a former day having obtained a rule to shew cause why the judgment should not be arrested:

Le Blanc now shewed cause against that rule. Admitting that an executor cannot maintain this action for trees cut down in the life-time of his testator (*a*), under the first count of this declaration, yet as it appears by the report that the evidence on which the verdict of the jury was founded applies to the second count only, the Court may rectify any mistake by entering a verdict on that count.

Williams Serjt. in support of the rule, contended that as evidence was produced at the trial of the fact of *cutting down* the trees, and the jury had given general damages, the Court could not apply those damages to the second count only, and that if therefore the first count was bad, the judgment must be arrested.

BULLER J. As evidence was given at the trial of the fact of cutting down, if there had been no other evidence to shew on what ground the damages were given by the jury, it certainly would not be competent to the Court to alter the verdict. But in this case there was evidence to shew that the damages given by the jury were compounded of the different sums for which the parcels of wood cut down by the Defendant were sold. This circumstance, therefore, does entitle the Judge to alter the *postea*, and the

(*a*) Vid. *Emerson v. Emerson*, 1 *Vent.* 18*f.* and also *De Mafon v. Dixon*, Sir *William Jones* 174, where *Hyde* and *Jones* Js. held that the 4 *Ed.* 3. c. 7. did not give trespass to an executor for a *clausum frigiti* or trees cut in the life time of his testator. Vid. *ciam* what was said by *Lord Kenyon*, 3 *T. R.* 549.

Court

Court must consider the case in the same light as if a verdict had been found for the Defendant on the first count, and for the Plaintiff on the second.

Per Curiam,

Rule discharged. (a)

1798.

WILLIAMS
v.
BREEDON.

(a) *Eddowes and Another v. Hopkins and Another, Doug. 376. Grant v. Afile, Doug.* 73c. also *Spencer v. Goter*, 1 H. Bl. 78.

BELL v. STONE.

Nov. 19th.
2 East, 430.

A letter written to a third person calling Plaintiff "a villain." held actionable, without proof of special damage.

ACTION on the case for defamation. The first count of the declaration, after stating that the Plaintiff was a land-surveyor, averred that the Defendant, intending to injure him in his reputation and hurt him in his profession, wrongfully and maliciously wrote and published a certain scandalous, malicious, and defamatory libel, in the form of and as a letter addressed to one *N.B.* to whom the Defendant was indebted in a large sum of money, in which letter was contained, of and concerning the Plaintiff, the following matter: "After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me; Mr. *H.* writes me you called upon him (meaning the Plaintiff) on the subject of your account, for which the villain gave you his note at five months;" that the Defendant in further prosecution of his said malice sent the said letter to the said *N.B.*, to the great hurt, prejudice, and injury of the Plaintiff, and to his great discredit and disgrace. There were other counts on words spoken in derogation of the Plaintiff's professional character, and of his ability to pay his debts. The conclusion, referring to all the counts, stated that the Plaintiff suffered special damage in consequence of publishing the said libel and speaking the said words, viz. that he was arrested by the said *N.B.* for the sum which he owed to him, and that he lost his business, &c.

Plea. The general issue.

This came on to be tried at the Bedford Summer assizes, when, the Plaintiff having failed in proving the special damage laid, Macdonald Ch. B. was of opinion that the letter on which the first count

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count proceeded, unsupported by proof of special damage — was not actionable, and directed a verdict for the Defendant. The counsel for the Plaintiff, however, contending that the letter itself was actionable, the Chief Baron asked the jury what damages they would give supposing the Plaintiff entitled to verdict in point of law. The jury answered 1s.

Sellon Serjt. on a former day obtained a rule to shew cause why the verdict for the Defendant should not be set aside, and a verdict be entered on the first count for the Plaintiff for 1s., on the ground that though the words in the first count might not be actionable, if only spoken, yet that being committed to writing, they were so.

Le Blanc Serjt. was this day to have shewn cause,

But the Court expressing themselves clearly of opinion that any words written and published, throwing contumely (a) on the party, were actionable, *Le Blanc* declined arguing the point, and the

Rule was made absolute. (b)

(a) 5 Co. 125. b.

(b) Sir John Austin v. Col. Culpepper, n.r.g. 2 Str. 899. Fitzgib. 253, 4. Villiers v. Monro, 2 Wilf. 403. King v. Sir Edward Lake, Hardres, 470.

Nov. 20th.

2 Bof. & Pult.
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If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought.

LE GREW v. COOKE.

ASSUMPSIT. The Defendant pleaded as to all but 30*l. non assumpsit*, and as to that sum a tender, and brought the money into court. The Plaintiff replied an original sued out on a particular day, and that the money was not tendered before that day, but took the money out of court.

A rule having been obtained on a former day, calling on the Plaintiff to shew cause why the replication to the plea of tender should not be struck out, on the ground of the Plaintiff's having admitted the tender by taking the money out of court.

Le Blanc Serjt. now shewed cause. In an action on the cause, where the cause of action does not arise from the non-payment of a particular sum at a particular day, the plea of tender admits the sum tendered to be due to the Plaintiff, and only denies his right to damages beyond that sum. But to the sum tendered the Plaintiff will be entitled, even though he should be nonsuited or a verdict pass against him, because the Defendant has admitted so much to be due to him: nor will the Court retain that money in their hands which must belong to the Plaintiff, in order to secure

Secure the Defendant's costs. *Cox v. Robinson*, 2 Str. 1027.
Cas. temp. Hard. 206. S. C.

1798.

 Le Grew
 v.
 Cooke.

Cockell and Shepherd Serjts. contra. It is said in *i Crompton's Prac.* p. 150. that " If a tender be pleaded with a *toujour prift*, " and the money brought into court, if the Plaintiff would go " for further damages he must not take the money out of " court, but take issue on the tender, or reply a request and " refusal; and if such issue is found against him he will be barred " of his action: but if he take the money tendered out of court, " judgment is given for the Defendant to go quit;" and a case in *this* court of *Cliff v. Jones*, T. 5 Geo. I. C. B. is there cited. This doctrine is perfectly agreeable to the opinion of Lord Holt, in the cases of *Horn v. Lewin*, 1 Lord Raym. 643. and *Burton v. Souter*, 2 Lord Raym. 774. And the reason why a party should not take money out of court when he traverses the tender, is given in *Hill v. Williams*, Barnes 358. 3d ed., namely, that the replication to the tender is a refusal to accept the money.

BULLER J. This is a point of practice which I had thought as clearly settled as any point ever was; and I am much deceived if it has not been more than once before the Court of King's Bench. It is perfectly certain, that whatever may become of this action, the Plaintiff will be entitled to the money tendered: and if that be the case, by what right can the Court retain it, as a security for the Defendant's costs, on the chance of a verdict being given in his favour? I agree that if the Plaintiff be negligent and do not take the money out of court until after a verdict has passed for the Defendant, that the Court will lay hold of it to secure the Defendant's costs (a): and if it could be shewn that the Plaintiff was now in that situation, the Court would not let him take out the money without doing justice to the Defendant. It being once admitted that the Plaintiff will be entitled to the money tendered at all events, the application must fall to the ground. The reason given in Barnes against allowing the Plaintiff to take the money out of court is absurd; that case is therefore *felo de se*, and the present application rests upon no other foundation than the opinion of a writer, who has indeed in general reported the

(a) Vid. *Ratbans v. Stedman*, *Cooke's Cas. Prac. C. B. 54.* and *Maddox v. Pafson*, 117. where money having been paid into court on the common rule and verdicts found for the Defendants, they were allowed to take it out of court in part of their costs.

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practice of the Court with accuracy, but whose assertion in this case is unsupported by authority, and contradicted by reason.

Per Curiam,

Rule discharged. (α)

(a) In an anonymous case, *M. ix Ann. Cooke's Cof. Prac. C. B. 5.* an executor Defendant having paid money into court on the common rule, was allowed to take it out again after a nonsuit; but it was said that if Defendant had not been executor or administrator, the Plaintiff should have had the money: and accordingly a similar application in *Lane and others v. Wilkinson, T. 13 Geo. 1. id. 36.*, where the Defendant was neither executor nor administrator, was refused. And in *Elliot v. Collow, Salt. 597.*

Nov. 20th.

WILLIAMS v. WATERFIELD.

The Court allowed the Defendant to justify bail after an attachment issued against the sheriff, but gave leave to the Plaintiff to oppose them without prejudice.

SHEPHERD Serjt. having moved to justify bail; *Le Blanc Serjt.* objected, that an attachment had already issued against the sheriff because bail were not put in in time, and that if he now opposed the bail without success, it would not be competent (—) to him afterwards to oppose setting aside the attachment against the sheriff, whereas if he did not oppose the bail, and the Defendant should afterwards succeed in a motion to set aside the attachment, the Plaintiff might have bad bail.

BULLER J. It was the practice in the King's Bench in these cases, and it seems to me to be the most convenient mode, for the Defendant to move for a rule to shew cause, why on putting in bail, the proceedings against the sheriff should not be stayed, and to have the bail ready to justify when that rule should be disposed of. But though that may be the better course in future, it must not affect this case.

Per Curiam, Leave given to the Defendant to justify his bail, and to the Plaintiff to oppose the same without prejudice.

(a) But in *Boldero v. Gray, Cwp. 769.* where the same objection was started to the practice then prevailing, of an exception to bail being a waiver of the bail-bond, the Court of K. B. resolved, that as the sheriff after he has been ruled must give notice

that he will put in and perfect bail before he can discharge himself, so a similar notice should be given in order to stay proceedings on the bail-bond, and then Plaintiff may oppose the bail in court, without its being any waiver.

1798.

DICKENSON, Executor, &c. v. BOYNE.

Nov. 21st.

SHEPHERD Serjt. moved to make a rule absolute for setting aside a judgment and warrant of attorney, given to secure an annuity on the ground that a clause of redemption contained in the deed was not inserted in the memorial.

Le Blanc Serjt. on the part of the Plaintiff, admitted the law (a) to be against him, but observed that as this was the case of an executor who could not be aware of the nature of the deeds, it would be hard to oblige him to pay costs.

And the Court being of that opinion made the

Rule absolute without costs.

The Court set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial, without costs, because it was the case of an executor.

(a) Vid. *Ex parte Ansell, ante*, 62. and the authorities there cited.

ENGLAND v. KERWAN.

Nov. 21st.

BAIL having been regularly put in and excepted to, the Defendant's attorney gave a notice of justification to the Plaintiff's attorney to the following effect: "Take notice that *J. R.* of, &c. will be added to the bail already put in, and that the said *J. R.* and *John Binford* of whom you have already had notice, will on, &c. justify, &c." *John Binford* was fully described when originally put in, though no description was added to his name in this notice.

Shepherd Serjt. opposed the justification, insisting that a description of *John Binford* should have been inserted in the notice.

Le Blanc Serjt. contra, contended, that when bail are regularly put in, no description need be inserted in the notice, and that the Defendant therefore had done all that was requisite in describing the added bail.

The Court finding on application to the officer, that where bail are regularly put in and excepted to, it is not the practice (a) for the Defendant to insert any description in his notice of justification,

Where bail are regularly put in and excepted to, the Defendant need not describe them in his notice of justification.

Admitted the bail.

(a) 1 Crompton's, Pr. 61. Tidd, Pr. 138.

1798.

No. 22d.

The KING v. DAVIS, One, &c.

It is no objection to a prisoner being discharged under the Lords' act, that his creditor is dead. An attorney in custody on an attachment for not paying over money received by him in the course of a suit, may be discharged under the Lords' act. The Court cannot under the words of 37 Geo. 3. c. 8. s. 2. moderate the sum to be paid to a prisoner on his being remanded, but a note must be signed for the full sum directed by that act. Such note cannot be signed by the creditor's attorney, if his client be dead.

THE Defendant having been imprisoned under an attachment for non-payment of money to the Plaintiff, in a cause of *M'Intosh v. Munday*, which he had received as attorney, was this day brought up to be discharged under the Lords' act.

Runnington Serjt. in opposition to his discharge, 1st, produced an affidavit that by accounts of the state of *M'Intosh's* health, very lately received from *Bath*, there was every reason to believe that he was no longer alive; and urged that if he were dead, there was no one to whom notice could be given according to the provisions of the act; 2dly, he contended, that as the Defendant was imprisoned by attachment, he was not dischargeable (a) under the statute.

But the Court over-ruled both objections, saying as to the last, that an attachment for non-payment of money is an execution. (b)

Runnington then applied to the Court to remand the prisoner on payment of a less sum than 3s. 6d. per week, insisting that the Court was authorized so to do, both by the words of 32 Geo. 2. c. 28. s. 13., which directs the Court to discharge the prisoner, unless the creditor will sign a note "to pay and allow weekly a sum not exceeding 2s. 4d." and by the case of *Hill v. Wadmore, Barnes*, 387. ed. 3., where the Court said that they had power to moderate the allowance, and remanded the Defendant upon the Plaintiff's allowing him 6d. per week; he added, that there was strong reason for the Court to exercise their power in this case, where the ground of imprisonment was, that the Defendant had received money as attorney in a cause, and retained it in his own hands when he ought to have paid it over.

The Court rejected the application, being of opinion that the words of the last act (c) which extend the allowance to 3s. 6d. per week, do not leave any discretionary power in the Court.

(a) *Sed vid. Rex v. Stokes, Corp. 136.*, where it was held that a party in custody upon an attachment for non-payment of costs may be discharged under the Lords' act. Vid. etiam *Rex v. Pickerill*, 4 T.R. 809. and *Rex v. Wilkinfon*, 7 T.R. 156.

(b) *Rex v. Myers*, 1 T.R. 265. *Bona fous v. Schools*, 4 T.R. 316.

(c) 37 Geo. 3. c. 85. s. 2. makes it lawful for the Court to discharge the prisoner, unless the creditor, his executors, admini-

strators, or assigns, insist upon such prisoner being detained in prison, and shall "agree in the manner mentioned in the last act with respect to the allowance not exceeding 2s. 4d. per week, to pay and allow weekly a sum not exceeding 3s. 6d. as any such Court shall think fit unto such prisoner," to be paid at the times, and subject to the regulations mentioned in the last act.

When the discharge was about to take place, the attorney concerned for *M'Intosh* gave a note for the weekly allowance of 3s. 6d. signed by himself.

Sed per BULLER J. The note must be given by the party in the suit, though in some cases it may be signed by his attorney; here it has been stated that the party himself is dead.

Per Curiam,

Let the prisoner be discharged.

1798.

The KING

vs.

DAVIS.

HOGAN v. PAGE.

Nov. 23d.

LÉ BLANC Serjt. moved for a rule *nisi* to stay proceedings on a single bond on payment of 105*l.*, together with the costs of the action.

Cockell Serjt. for the Plaintiff, stated, that the only question was, whether the Plaintiff was entitled to interest on which they wished to take the opinion of the Court.

The bond was in this form:

Know all men by these presents, that I *R. Page* am held and firmly bound unto *M. Hogan*, master of the ship *Cornwallis*, in 105*l.* of good and lawful money of *Great Britain*, to be paid to the said *M. Hogan*, his executors, administrators, and assigns, in consideration of being found in a passage by the said *M. Hogan*, and on the same ration as the seamen of the said ship, with all medical assistance during the said voyage to *England*, for which payment to be well and truly paid, I bind myself, my executors, and administrators, firmly by these presents. Sealed, &c. and dated 13th May, 36 Geo. 3.

The Court were clearly of opinion, that no interest ought to be given, and made the

Rule absolute. (a)

(a) *Sects.*, in the case of a bond conditioned for the payment of a lesser sum; on which interest must be paid from the day of the date: though no interest be reserved in

Proceedings on a single bond stayed by the Court on payment by the obligor of principal and costs, without interest.

ROBERTS v. GIDDINS.

Nov. 23d.

CARTON Serjt. before shewing cause against a rule for staying proceedings on the bail-bond, objected to the affidavit on which the rule *nisi* had been obtained, because it was intituled in the action against the bail, whereas it is the usual practice for these

An affidavit to found a rule for staying proceedings on a bail-bond, should be intituled in the action against the bail.

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motions to be made in the original action; which practice, he said, had been adopted in order to save expence to the parties.

Sed per BULLER J. The action on the bail-bond is depending: then why should not this affidavit be read? Whereindeed, no action against the bail is commenced, as if a motion be made to cancel the bail-bond, the affidavit must be intitled in the original action; for unless it be intitled in some action, no perjury can be assigned upon it.

Per Curiam,

Let the affidavit be read.

Nov. 24th.

Where no point has been saved at the trial, the Court will not set aside a verdict on a question of law, if the justice and conscience of the case be with it. It seems that a woman living apart from her husband in a state of adultery, is liable on her own contracts, though she has no separate maintenance.

COX v. KITCHIN.

INDEBITATUS afflumpfit, for goods sold and delivered, and work and labour done.

Plea, General issue.

The cause was tried before *Rooke J.* at the *Westminster* fittings in this term, when it appeared, that the Defendant was the wife of one *Wells* who was then living, but that for the last four or five years she had gone by the name of *Kitchin*, having lived during that time as mistress with a person of that name (a); that she kept an hotel, and that the action was brought by the Plaintiff as a carpenter, for materials found, and work done, in fitting up the hotel. The learned Judge directed the jury, in case they should be of opinion that the Defendant was living in a state of open adultery at the time of the contract made, to find a verdict for the Plaintiff, for as the husband under those circumstances would not then be liable, he thought that the wife must be liable herself (b). A verdict was accordingly found for the Plaintiff. No point was saved for the opinion of the Court.

Williams Serjt. on this day moved for a rule to shew cause why the verdict should not be set aside, and a new trial be had on the authority of *Gilchrist v. Brown*, 4 T.R. 766., where it was decided on demurrer, that a replication to a plea of coverture was bad, because it was destitute of the principle on which all the modern cases had proceeded, where feme coverts had been held liable; viz. a separate maintenance.

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2 Esp. N.P.
Cof. 637.

(a) In *Norwood v. Stevenson*, T. 11 & 12 Geo. 2. B. R. Bull. N.P. 136., and in *Hudson v. Brent*, fittings after Hil. T. 26 Geo. 3. coram Lord Mansfield, E.P. N.P. 124., it was held that if a man cohabits with a woman, allows her to assume his name and passes her to the world as his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries.

(b) It was taken for granted by the Judges on both sides in *Manby and Another*

v. *Scott*, 1 Lev. 4., that the wife could never be charged; though they differed as to the liability of the husband. And in *Hatchett v. Baddeley*, 2 Bl. Rep. 1082., *Blackstone J.* held, that although the husband were not bound to pay the debt, it did not follow as a legal consequence that the wife should be compelled alone: and he was of opinion in that case, that the debt could not be recovered of either.

BULLER J. This case comes before the Court under very different circumstances from those of the case cited. The question therearose on demurrer, whereas this is a motion to set aside a verdict. Motions for new trials are governed by the discretion of the Court. Where the Judge at *Nisi Prius* has thought fit to save a point; the Court has been in the habit of considering itself in the situation of a judge, at the time of the objection raised. But this case comes before us without any point saved, and therefore we must look to the general justice of the case before we interpose by granting a new trial; nor is it necessary that we should nicely examine whether the Defendant be strictly liable in point of law. The leading reported decision on the subject of granting new trials is that of the Dutchess of *Mazarine*(a). There can be no doubt but that was the case of a verdict against law: yet the Court said, that as the justice and conscience of the case were clearly with the verdict, they would not interpose(b). Here it is perfectly clear, that the husband was not liable: that point was solemnly decided in the Court of King's Bench in a case which was tried before me at *Taunton*(c); there it appeared that the wife had been turned out of doors by her husband, and afterwards committed adultery, but, before the cause of action accrued, had ceased to live in a state of adultery, and had offered to return; and the Court held, that in consequence of the woman having once gone off with an adulterer, the husband was discharged for ever. Here therefore the husband is not liable; and if the wife be not, she stands in a most miserable condition. How is she to find the means of supporting herself? How is she to procure even a joint of meat for her daily subsistence? She can obtain no credit, unless she be liable for her debt: her situation would be melancholy in the extreme. But whether she be strictly liable or not, it appears that she has

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(a) 1 *Salk.* 116. 2 *Salk.* 646.
 (b) *Vid. etiam Smith v. Bramston; Smith v. Frampton: Anonymous, Paf. 8 Will. 3. 2 R. and Smith v. Page, 2 Salk. 644. Sparks v. Spicer, 2 Salk. 648. Dunkly v. Wade, 2 Salk. 653. Goflin v. Willcock, C.B. 2 Wilf. 306. Sampson v. Appleyard, C. B. 3 Wilf. 272. Allen and Another v. Sir John Peppard Bart, 2 Black. 1177. Doe v. Williams, Comp. 622. Farewell v. Gaffey and Others, 1 Burr. 53. Dr. Burton v. Thompson, 2 Burr. 664. Fentzoff v. Duke of Devonshire, 2 Burr. 936. Edmondson v. Macbell, 2 T.R. 4. Wilding v. Payne, 4 T.R. 468.—But if the Court had considered the verdict in the*

present case to be clearly wrong in point of law: Qu. whether a new trial would not have been granted? For in *Wisee v. Raftall*, 4 T.R. 753., it was said by the Court, that there was no instance in which a new trial had been refused, where the verdict had proceeded upon the mistake or misdirection of the Judge. Also *Calcraft v. Gibbs*, 5 T.R. 20, where Lord Kenyon said, Where there is any ground of objection to the law delivered by the Judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is.

(c) *Couier v. Hancock*, 6 T.R. 603.

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lived as a feme sole, that she has represented herself as such, and has obtained credit under that character. The defence therefore is dishonest and unconscientious, and on that ground I think that the Court ought not to interpose.

HEATH J. On the last point I agree with my Brother *Buller*, viz. that as the Defendant has lived and contracted as a feme sole she ought to be liable for her debts.

ROOKE J. I am of the same opinion.

Williams took nothing by his motion. (a)

(a) Vid. *De Gaillon v. L'Aigle*, post, Nov. 27th, and the cases there cited, 357.

Nov. 24th.

3 Term. 12.

Plaintiff was employed to wash clothes for Defendant who was a prostitute, knowing her to be such; and held that the use to which the clothes might be applied, could not bar Plaintiff of an action for work and labour.

LLOYD v. JOHNSON.

INDEBITATUS assumpfit for work and labour done, and on the common money counts. Plea, Non assumpfit.

At the trial before *Rooke* J. at the *Westminster* fittings in this term, it appeared by the evidence of a servant maid of the Defendant, (who was also a daughter of the Plaintiff,) that the Defendant was a prostitute, and that this action was brought to recover the amount of a bill delivered for washing done by the Plaintiff's wife. By the bill of particulars it was shewn that the articles washed, consisted principally of expensive dresses, and that there were also some gentlemen's night-caps; the witness swore that the former were for the purpose of enabling the Defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress. She also proved that the Plaintiff and his wife had full knowledge of the Defendant's situation, and of the purposes to which the articles in question were applied. The learned Judge, on an objection taken to the Plaintiff's recovery under these circumstances, was of opinion, that no such immorality in the contract on the part of the Plaintiff had been proved, as ought to defeat the action. Verdict for the Plaintiff.

Cockell Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit be entered, and cited *Crisp v. Churchill*, E. 34 Geo. 3. coram Eyre Ch. J., where in an action for use and occupation of a lodging, it being set up that the Defendant was an infant and a prostitute, the Chief Justice was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have a lodging; but it being shewn

shewn that the lodging was let to the Defendant for purposes of prostitution, and with a knowledge on the part of the Plaintiff of that fact, he held that the action was not maintainable. (a)

BULLER J. What do you mean by the expression of clothes used for the purposes of prostitution? This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose, and which were not. As to the case before my Lord Chief Justice, I suppose the lodgings were hired for the express purpose of enabling two persons to meet there, which would certainly be unlawful. Here the Plaintiff's wife was employed generally to wash the Defendant's linen, and the use which the Defendant made of it cannot affect the contract.

HEATH and ROOKE, Justices, being of the same opinion,
Cockell took nothing by his motion.

(a) Vid. etiam *Girarday v. Richardson*; was ruled by Lord *Kenny*, at the *Westminster C. of N. P.* 13., where the same point afterittings after *E. term*, 33 Geo. 3.

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8 T.R. 465.
2 B&F. & P. 118.

Plaintiff cannot sign judgment for want of a plea, without demanding one; though Defendant has not taken the declaration out of the office.

WHITE v. DENT.

THE Plaintiff having filed his declaration, the Defendant appeared, but never took the declaration out of the office: when the time for pleading was out, the Plaintiff signed judgment without having demanded a plea.

A rule nisi having been obtained to set aside this judgment for irregularity,

Clayton Serjt. now shewed cause, and contended that if the Defendant does not take the declaration out of the office no demand of a plea need be made, for if the Defendant pleads without having taken the declaration out of the office, his plea is a nullity. (a)

Shepherd Serjt. contra urged, that the Defendant is not bound to take the declaration out of the office till he actually pleads.

The Court, on inquiry of the officers as to the practice, having found a difference of opinion, said, that although the Defendant must take the declaration out of the office before he pleads, yet that as he may take it out the very hour before he pleads, the Plaintiff ought not to sign judgment without demanding a plea.

Rule absolute without costs. (b)

(a) R.T. 12 W. 3. B.R. R.M. 10 G.2. (b) Vid. *Nott v. Oldfield*, B.R. 1 Wilf. B.R. *Kedding v. Newton*, B.R. 1 Wilf. 173. 134.

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Pof. 482. n.
2 Bl. & Pof.
236.
2 New Rep. 132.

Though there be not 15 days between the *teste* and return of a *capias*, yet it is amendable. If a *capias per continuance* be *teste'd* on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original bear *teste* before the cause of action accrued. Taking out a summons before a Judge to stay proceedings on the bail-bond, is a waiver of an irregularity in the notice of declaration.

DAVIS, one, &c. Assignee of the Sheriff, v. OWEN and THOMAS.

A N attachment of privilege at the suit of the Plaintiff, returnable on the Morrow of All Souls, having issued against the Defendant *Owen* and one *Michael Hughes*, *Owen* on the 8th November put in bail with the Filazer, and immediately gave the Plaintiff notice thereof. *Hughes* left the kingdom. The Plaintiff finding that the Defendant *Owen* had by mistake put in his bail with the Filazer instead of the Prothonotary (with whom in attachments of privilege bail should be put in) waited till the expiration of the time for perfecting bail, then took an assignment of the bail-bond, and sued out a *capias ad respondendum* upon it against the present Defendants, *teste'd* the 6th November, returnable the 18th November, with a copy of which the Defendant *Thomas* was served: but *Owen* not having been served with it, the Plaintiff sued out a *capias per continuance*, also *teste'd* 6th November, with a copy of which *Owen* was served. A notice was delivered to the Defendant *Thomas* of a declaration against him only. On the 20th November bail in the original action were put in for the Defendant *Owen* with the Prothonotary.

A rule *nisi* was obtained on a former day to set aside the proceedings on the bail-bond for irregularity, on three grounds: 1st, Because there were not fifteen days between the *teste* and return of the original *capias*: 2dly, Because the *capias per continuance* was *teste'd* on the same day as the original *capias*, whereas it should have been *teste'd* on the return-day of such *capias*: 3dly, Because the writ was joint against *Owen* and *Thomas*, and the notice of declaration several against *Thomas* only.

Marshall Serjt. this day shewed cause, and contended, 1st, that the *capias* was amendable (*a*), *Carty v. Ashley*, C.B. 3 Wilf. 454. 2 Bl. 918. *S.C. Bourchier v. Wittle*, 1 H. Bl. 291. 2dly, That a *capias per continuance* may bear *teste* on any day; or that if necessary a new original *capias* may be sued out, bearing *teste* such a day as will warrant the *capias per continuance*, in the same manner as an original *capias ad satisfaciendum* may be sued out, where a Defendant has been taken on a *capias ad satisfaciendum* issued into

(a) Vide tamen *Williams v. Faulkner*, *Hawker, Barnes*, 420. ed. 3. and *Whale v. Barnes*, 409. ed. 3. *Atkinson v. Taylor*, *Fuller*, 1 H. Bl. 222. 2 Wilf. 117. *Barnes*, 427. *S.C. Holt v.*

a differ-

a different county from that in which the action is brought (a). 3dly, That if there were any irregularity in the notice of declaration, the Defendant had waived it by taking out a summons before a Judge to stay proceedings on the bail-bond, on the usual terms. He stated that the Plaintiff would not have taken an assignment of the bail-bond for the Defendant's mistake in putting in bail, but to prevent the expence of being obliged to proceed to outlawry against *Hughes*, who had fled the kingdom.

Le Blanc Serjt, *contra*, insisted, 1st, that the power of amendment being discretionary in the Court, they would not exercise that power in favour of the Plaintiff in a case of such sharp practice as the present. 2dly, That it is absurd for the *capias per continuance* to bear *testie* on the same day as the original command, and that if such a new original *capias* as was suggested by the other side were sued out, it would bear *testie* before the cause of action accrued. 3dly, That no irregularities, which could be taken advantage of when the parties went before the Judge, were waved by that application, the object of which was the same as that now before the Court.

BULLER J. The first objection is of no weight, for it clearly appears by authorities that the Court will alter a *capias* so as to make fifteen days between the *testie* and return. Here a mistake was committed by the Defendant in putting in his bail; and in strictness I cannot say that the assignment of the bail-bond was irregular, but as the Plaintiff had notice that the bail were put in, I think it was such sharp practice on his part, as to justify the Court in finding some means to prevent him from getting his costs by it. The second objection is to the *capias per continuance*, but an original *capias* may be sued out to warrant that; and it will be no objection to such original *capias* that it will bear *testie* before the cause of action accrued (b). I have often talked with the late Mr. Justice *Gould* on this subject, who went great lengths in amending writs of *capias*, and his reason was, that as a writ of *capias* never appears on the record, it is of no consequence whether it bear *testie* before or after the cause of action accrued; and if a *latitat* may be sued out (as it certainly (c) may) before the cause of action accrues, and a *capias* may not, the courts of King's Bench and Common Pleas are not on an equal footing. As to the third objection, it

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(a) *Shaw v. Maxwell*, 6 T.R. 450.
(b) 1 Crompton's Pr. 25. Imp. P.R. C.B. 154. ed. 4. Sed vide 1 Sellon's Pr. 83.

(c) *Johnson and Another v. Smith*, 2 Burr. 962, 7. *Foster v. Bonner*, Cwp. 454. and *Bell v. Wilding*, 7 T.R. 4.

ed. 2. has

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has been held that taking any step in a cause, as appearing (a), is a waiver of any irregularity. Now it does seem that the taking out a summons in this case was a step; for unless the Defendant was served with a writ in consequence of which he was obliged to appear, why should he go before a Judge to be relieved? By so doing he allows that he has been served with process to which he ought to be answerable. The only thing to be considered is, on what terms the Court should stay proceedings on the bail-bond. Now as the practice on the part of the Plaintiff has been so exceedingly sharp, I think the order should be to stay proceedings on the bail-bond without costs, the Defendant *Owen* undertaking not to plead in abatement that *Hughes*, who has fled the kingdom, is not joined in the declaration.

And in this way the Court made

The rule absolute:

(a) *Fox and Another v. Money, widow, ante, 230. and post, 383.*

Nov. 24.

DYER, Demandant, v. BULLOCK and Others, Tenants.

The 8 & 9 Will. 3. c. 31. s. 1. which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear.

Shepherd Serjt. having obtained a rule to shew cause why proceedings on a writ of partition should not be stayed, on the ground of a notice of the writ, with a copy thereof, not having, according to the directions of the 8 & 9 Will. 3. c. 31. s. 1. been served forty days before the return:

Le Blanc Serjt. shewed cause, and observed that the 8 & 9 Will. 3. c. 31. s. 1. only applies to cases of signing judgment (a) by default for want of appearance, whereas here the tenants had appeared. *Shepherd* admitted the construction of the statute to be against him,

And the Court being of the same opinion,

Discharged the rule.

(a) *Vid. Hulton v. The Earl of Thanet, 2 Bl. 1134.*

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WYATT and Others v. SMEE.

An affidavit to hold to bail, stating "that " J.S. has made " no tender to " pay in notes of the Bank of England" excludes the possibility of any other person having tendered for him, and sufficiently complies with 37 Geo. c. 45. s. 9.

sworn

sworn that "no tender was made by the said J. Smee to pay in notes of the Bank (a) of England," whereas it should have been sworn generally that no tender was made; for though J. Smee might have made no such tender, yet it might have been made by some other person for him, consistently with the affidavit.

BULLER J. If any other person had made an offer for the Defendant, it would have been an offer by the Defendant.

Le Blanc took nothing by his motion.

(a) *Vid. 37 Geo. 3. c. 45. s. 9.*

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Nov. 26th.
8 Term Rep.
275. 552. where
this judgment is
reversed by *B.R.*
3 *B&F. & P.ull.*
200.
15 *Eas. 6.*

If the name of
the broker ef-
fecting a policy
of insurance be
inserted in the
policy as "agent,"
it is a sufficient
compliance with
the 28 *Geo. 3.*
c. 56. Goods,
the produce of
Holland, pur-
chased in that
country during
hostilities be-
tween *Holland*
and *Great Bri-
tain*, by a British
agent resident
there, and shipped
for British sub-
jects, were in-
sured by them
in this country;
held, that this
was a legal insu-
rance.

BELL and Others v. GILSON.

THIS was an action on a policy of assurance underwritten by the Defendant on the 8th December 1797, for 200*l.*, on goods shipped on board the *Elizabeth*, Captain *Spewce*, from *Rotterdam* to *Hull*, at a premium of two guineas and a half per cent. The first count of the declaration stated that the Plaintiffs caused to be made the policy of assurance, purporting thereby and containing therein that *Barrett and Co. agents*, the names of *Barrett and Co.* being the usual style and firm of dealing of the persons residing in *Great Britain*, who received the order or and effected the said policy of assurance, as well in their own names, as for and in the name and names of all and every other person or persons to whom the same did, might, or should pertain, in part or in all, did make assurance, &c.; and the said first count averred the interest to be in the Plaintiffs, and that the insurance was made on their account, and for their use and benefit; that the ship sailed on the voyage insured with the goods on board, and that in the course of that voyage she was captured by the *French*, and the goods and the voyage lost. There were also counts for money had and received, and money laid. The Defendant pleaded the general issue *non assumpit*, in which issue was joined; and paid the premium into court on the count for money had and received.

This cause came on to be tried by a special jury at the last sitting in *Trinity* term at *Guildhall*, before *Eyre Ch. J.*, when a verdict was found for the Plaintiffs for 194*l.* 15*s.*, subject to the opinion of the Court on the following case:

The Plaintiffs, being *British* merchants resident in *London*, gave orders to Messrs. *Barrett and Co.* insurance-brokers (also resident in

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in *London*) to effect the policy in question, who as brokers effected the same in their own name and usual firm of *Barrett* and Co., describing themselves therein *agents*. The ship *Elizabeth* was a neutral vessel belonging to *H. Bauerman and Son*, of *Greetsyl* and *Embden* in *Prussia*, bound on the voyage insured from *Rotterdam* to *Hull*, on which she sailed, and was captured as stated in the declaration; and the Plaintiffs had goods on board her for the voyage insured of greater value than the amount insured. The said goods, consisting of sixty casks of madders, were purchased for the Plaintiffs, and on their account, at *Rotterdam*, by *Robert Twiss* their agent resident there. When the goods were purchased on the Plaintiff's account, and also at the time of the shipping and capture thereof, and when the said insurance was made, open hostilities had commenced and then existed between *Great Britain* and the persons exercising the powers of government in the United States. During all that time it was and is the constant practice to enter goods at the Custom-house direct from *Holland*, and was never impeded, though the officer at the Custom-house knew whence they came, as he always inquired whether they were aliens or neutrals, on account of the alien duty.

The questions for the opinion of the Court were, 1st, Whether the name of *Barrett* and Co. agents, inserted in the policy, were a sufficient compliance with the stat. 28 Geo. 3. c. 56.? 2dly, Whether the said insurance on the said goods were legal?

Heywood Serjt. for the Plaintiffs. The first question in this case is, whether this policy, effected in the name of *Barrett* and Co. as agents, has sufficiently complied with 28 Geo. 3. c. 56.? As this point, however, has been decided in the course of this term, not only in this court (a), but also in the court of King's Bench (b), I shall leave it without any further argument, and pass to the second question, viz. whether an insurance on goods purchased by

(a) *Wolf and Others v. Hornastle*, ante, 316. "and effected the said assurance." In interest in the Plaintiff was averred. A verdict was found for the Plaintiff, and a rule nisi for a nonsuit obtained, on an objection to the form of the policy as not sufficiently complying with the 28 Geo. 3. c. 56. because effected in the name of *Grandclos* and Co., without stating them to be *agents*. This point was to have been argued this day, but Lord *Kenyon* said he was surprised to find the rule had been drawn up, as there was nothing in the case. Accordingly the rule, without argument, was discharged.

(b) The following was the case alluded to:
De Vignier v. Swanson, B.R. Nov. 16th. Action on a policy of assurance effected in the name of *Grandclos* *Mrsle* and Co., who were brokers to the Plaintiff, and also agents to her in several money transactions. The Plaintiff, as well as *Grandclos* and Co., resided in *London*. The latter were not called agents in the policy, but in the declaration were stated to be "the persons residing in *Great Britain* who received the order for

a British

a *British* subject in an enemy's country, and shipped for this country on his own account in a neutral vessel, be legal? Suppose the property in dispute to have belonged to the Plaintiff before the commencement of the present war, will it be contended that in such case he would be precluded from bringing it home? Whatever may be the objection to allowing *British* subjects to export goods, on the ground of such exportation being of assistance to the enemy, there is no policy which forbids him to bring goods from thence, as that tends to distress the enemy. It is not laid down as a general proposition in *Grotius*, *Puffendorff*, or *Vattel*, that commerce is prohibited between powers at war. There may be ordinances of particular countries to this effect, such as that of *Barcelona* (a), of the year 1484, cited in *Bristol v. Towers*, 6 T. R. 45., and though *Valin*, tom. 2. p. 31., says, that every declaration of war contains a prohibition of commerce, yet it appears from the next paragraph, p. 32., in which he relies on the ordinances of *France* of the years 1543, art. 42. and 1584, art. 69., that his observation must be confined to the law of his own nation: and this is confirmed by a passage in *Emerigon, Traité des Assurances*, tom. 1. p. 128., from which it appears that the declarations of war issued by the Kings of *France* always contained an express prohibition of commerce with the enemy. Indeed if the declarations of war issued by this country had usually contained the same prohibition, it would not affect this case, since the present war with *Holland* commenced under a proclamation for general reprisals only. With respect to the law of *England*, *Lord Mansfield*, in *Gift v. Mason*, 1 T. R. 85., said, that he knew of two cases only in which a subject had been prohibited from trading with the enemy. The first of those cases (*viz.* 2 *Roll. Abr.* 173. *Prerogative* (L), *Guerre*, where trading with *Scotland*, then in a general state of enmity with this kingdom, was held illegal) goes much farther than this, for the party there not only bought of the enemy, but sold to him: and the second was a case of corn carried by a subject of this country to the enemy; now corn is clearly a contraband article in time of war; for, though the commencement of hostilities does not create a prohibition of all commerce with enemies, yet it does of such commerce as may be the means of affording them assistance. [*Heath J.* In the case in *Roll. Abr.* the keepers of the truce permitted two persons to go into *Scotland*, which was clearly illegal in

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(a) See also *Ordn. of Stockholm* 2. Mag. 257. No. 1028.

them,

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them, for by so doing they exceeded their authority, as information might thereby have been given to the enemy. The second case cited by Lord Mansfield happened in the time of famine (a), and probably a proclamation had issued prohibiting the exportation of corn (b).] In *Henkle v. The Royal Exchange Assurance Company*, 1 Vez. 320. Lord Hardwicke observed that it might be going too far to say that all trading with enemies is unlawful. With respect to the cases of *Brandon v. Nesbitt*, 6 T.R. 23. and *Bristol v. Towers*, 6 T.R. 35., it is sufficient to say that the actions in those cases were brought in favour of alien enemies: and it is clear that the decisions proceeded only on the ground of a disability in the Plaintiffs at the time of the action brought, since Lord Kenyon in *Brandon v. Nesbitt*, when commenting on the case of *Ricord v. Bettingham*, 3 Burr. 1734, and 1 Bl. 563— S.C., where it was held that an action by an enemy might be maintained on a ransom bill, observed that the action there was not brought until peace was restored. It is certain that the Legislature of this country has not considered hostilities amounting to a general prohibition of importing articles from the enemy's country, since it has been thought necessary in every war from the reign of Charles the Second to this time, to pass acts of parliament (c) for prohibiting or regulating the importation of particular articles during particular periods, which would not have been requisite if such trade had been already prohibited *in toto* and for ever.

Williams Serjt. for the Defendant. 1st, The case of *De Vignies v. Swanson* is distinguishable from this, since the brokers who effected the policy there were the general agents of the Plaintiff, whereas here Barret and Co. were only employed in this particular transaction; the same observation will apply to *Wolff v. Horn casle*, where that fact was much relied on by the Court. A mere broker is not within the words of the 28 Geo. 3., for he is neither the person interested, the consignor, the consignee, the person giving the order for insurance, nor the person receiving it from those who are interested. By the expression "as agents," used in this policy, the underwriter has been deceived, since he may have been led to suppose that Barret and Co. were the gene-

(a) This appears from Park's *Insur.* 238. which is founded on the manuscript note of *Giff v. Majon*, cited in the margin of the same book, p. 242. a.

(b) Which would bring the case within

the principle of *Delmada v. Motteux*, Park's *Insur.* 234.

(c) See these acts collected in the argument of *Bristol v. Towers*, 6 T.R. 40, 1, 2, 3, 4.

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ral agents of the Plaintiffs, which they do not appear to have been. 2dly, The supposition of this property having belonged to the Plaintiff before the commencement of the war, is excluded by the case. It is established by *Bristol v. Towers* that the insurance of enemies property is illegal; and though the judgment in that case appears to have been given with reference to *Brandon v. Neftitt*, yet they were different; for as there was a plea of alien enemy in the one and not in the other, we must conclude that *Bristol v. Towers* was decided on the illegality of the trade. With respect to the policy of the question, this case is stronger than the two above-mentioned decisions; for if it be not lawful for an enemy to spend his money here to the advantage of this country, it certainly cannot be lawful for a *British* subject to enrich the enemy by purchasing his goods. By the case in 2 *Roll. Abr.* 173. *Prerogative* (L), *Guerre*, it distinctly appears that it is illegal for an *Englishman* to traffic in the enemy's country. The commencement of hostilities puts an end to all amity and commerce (a). If this neutral vessel had been captured by an *English* ship of war, though the vessel would have been restored to the owners, it is clear, both from the general practice of the Court of Admiralty, and from the express decision by the Lords Commissioners of Appeal, in the *Louisa Margaretha*, Henslop, 3d April 1781, that the goods would have been condemned as lawful prize. (b)

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(a) *Bras. Quat. Juris. Pub. lib. 1. c. 3.*
p. 197. fol. ed. 1767.

(b) *John Kirkpatrick Escott of London, Claimant and Appellant, against Henry Smalley, Captain and Respondent.* (See printed Proceedings in the Court of Appeal, from which the following statement is abridged.)

Kirkpatrick, Escott, and Reed, of London, for many years previous to the commencement of hostilities between Great Britain and Spain, in 1779, traded to Malaga, and had an established house there: at which place *Escott*, one of the partners, resided, till within ten months previous to the war. On his leaving Malaga considerable quantities of wine and other merchandise belonging to the house, and deposited in vaults and warehouses set apart for the same, were left in the hands of one *Henry Griegne*, a Fleming by birth, and brought up in the house, who was suffered to remain at Malaga as agent for the partners, for the purpose of preserving the wines for them during hostilities, with directions to remit them to

London if a favourable opportunity should offer, and to act under the firm of *Griegne* and Co. Part of the cargo claimed consisted of wines taken from the above mentioned stores, and the residue (with the exception of two chests of hams, which were a present from *Griegne*) of goods, the produce of Spain, purchased by *Griegne*, for the partners, and by their order. These goods were shipped on 7th April 1780, by *Griegne*, on board the *Louisa Margaretha*, a Dutch ship, furnished with a pass or sea-brief according to treaty, for the sole purpose of being remitted to the partnership; but to prevent its being known in Spain that they were the property of *Englishmen*, it was expressed in the bills of lading that they were shipped on neutral account and risk, and to be delivered at Oland, for which port the ship was chartered and cleared out. *Griegne* was to receive 14 per cent. on the goods remitted, but no person whatever, except the three partners in *London*, was interested in them. The

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Heywood in reply. The cases of *Brandon v. Neftitt* and *Bristow v. Towers* must both be considered as having proceeded on

The ship set sail on the 11th of April from *Malaga*, but being obliged to put back, *Grievne*, before she could sail again, received a letter from the partnership, ordering him to send the ship direct to *London*, under the expectation of her being protected by the *Levant* bill [1] then pending in parliament. She accordingly sailed direct for *London* on the 21st April; and on the 15th May was, captured by a British privateer near the English coast. On the 1st June 1780 the Court of Admiralty, by consent of the parties, restored the ship, reserving the adjudication of the cargo; but on the 8th July following condemned it as lawful prize. From this determination there was an appeal to the Lords Commissioners.

Reasons for the Appellant.

1st, For that it is sufficiently proved that the goods claimed were at the shipping and capture thereof the sole property of Messrs. *Kirkpatrick* and Co. British subjects, who had no other means of conveying them with safety from *Spain*.

2d, For that the order of Council suspending the Dutch treaty bears date the 17th April 1780, and the ship last sailed from *Malaga* the 21st of the same month, so that it was impossible for Messrs. *Kirkpatrick* and Co. to have countermanded the voyage, and that undoubtedly Mr. *Grievne* had reckoned on the peculiar privileges enjoyed by the States General of the United Provinces respecting their trade and navigation in time of war, and it is submitted that the Judge of the Admiralty Court has construed the suspension directed by the said order of Council as referring to the times and places of capture; whereas, as is also submitted, that reference was intended to be had at the time of the ship's departure from the ports of loading; for that otherwise the avowed object of delay in the suspension by the said order, to wit, *from a regard to the interest of individuals, and a desire to prevent their suffering by any surprise*, would not be answered, inasmuch as it is impossible (as was the case in the present voyage) to direct the alteration of the voyage, which had been already begun.

3d, For that the *Levant* trade bill (which passed previous to the arrival of this ship in *England*) authorized the importation of such goods direct from the *Mediterranean* in neutral ships; and that this was the intention of the Legislature in passing this act is manifest, inasmuch as the act, which was not passed till the month of June 1780, had retrospect to the 1st of the preceding January, in order to comprehend many cargoes, the produce of *Spain*, within the Straights of *Gibraltar*, (which, in expectation that the act would have passed sooner than it did,) had been imported by British subjects in foreign vessels, (and in every respect under the same circumstances with this cargo,) and deposited by an order of the Lords of the Treasury in the King's warehouses, on bond that they should be either re-exported in a limited time, if the act should not pass, or pay the duties if it should; and when the act had passed, they were admitted to an entry accordingly; and since that period the produce of *Malaga*, and other ports of *Spain* within the *Mediterranean*, has continued to be imported directly from the places of their growth, in foreign vessels, in virtue of, as is understood, of the said *Levant* trade bill.

Reasons for the Respondent.

1st, Because after actual hostilities between two states, and the issuing of letters of general reprisals, all trade and intercourse between the subjects of those states is illegal, even though no express prohibition of trade should be issued, because every subject is bound by virtue of his allegiance obliged to assist his King and distress the enemy to the utmost of his abilities, and not to aid or assist them either by trade or otherwise.

2d, Because if British merchants were permitted in time of war to import goods into this kingdom immediately from and the produce of the territories of the enemy, under a pretence that the articles imported were such as were their property and deposited in their warehouses prior to hostilities, it would operate to a very alarming degree; their warehouses might be constantly supplied by their agents during the whole war, and a continual and extensive trade might

on the same principle, *viz.* that an action cannot be maintained in favour of an alien enemy: that having been expressly stated as the ground of the former decision, and the Court having professed in the latter case to be governed by the authority of the former. The case cited from the *Cockpit* may have been determined on two grounds very different from those on which this case rests. 1st, The goods at the time of the capture might have been considered as belonging to persons *inhabiting* in *Spain*: for though the Plaintiffs themselves were resident in *London*, they had a partner (*a*) resident at *Malaga*, where the house of business was continued. Which brings the case within the command of the proclamation for reprisals, "to seize the "goods of all persons *inhabiting* within the enemy's state." 2dly, As the bills of lading were made out to *Ostend*, which was not the real port of discharge, the documents were fraudulent. With respect to the policy of allowing the trade in question, since it is stated in the case to be usual for the Custom-house to permit goods to be imported under circumstances similar to the present, this sort of trade is at least allowed by the Government of the country, who must be presumed to be the best judges of the mere policy.

BULLER J. (after stating the case). On this case two questions have been raised; 1st, whether the policy which is described to have been made by *Barrett and Co.* as agents sufficiently com-

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be carried on, to the very great benefit and support of the enemy.

3d, Because in this case, besides the wines claimed by the appellant, as having been his property, and deposited in his warehouses in *Spain* prior to hostilities, there is a considerable quantity of other goods claimed by him as his property, and as having been bought in *Spain* by his orders since the commencement of hostilities; which avowal of a trade so repugnant to his duty as a *British* subject will, it is hoped, not only warrant the sentence of condemnation of the property claimed, but subject the claimants to exemplary costs.

4th, Because the *Levant* act, on which *Mr. Escott* the appellant, seems in a great measure to rest his cause, is not applicable to the present case, such act being calculated only to permit an importation into *Great Britain* from neutral ports, and in neutral bottoms, of such goods as could not before have been imported in any other than *British* ships, but not to give any countenance or warrant to the subjects of *Great Britain*

to carry on a trade directly or indirectly with the enemy, in a neutral ship from a neutral port, and much less from an enemy's port to the port of *Great Britain*.

On the 23d April 1781 the Lords Commissioners of Appeal (present Earl Bathurst, President of the Council; Earls Sandwich, Marchmont, Hillborough, Clarendon; Viscount Stormont; Lords Grantham; Langborough, Ch. J. of the Common Pleas; and Sirs Richard Worsley and John Goodricke) affirmed the decree of the Court of Admiralty.

See also the case of the *Saint Elizabeth*, *Lauritz*, 29th June 1749; the *Comte Wobrenzorff*, *Willers*, 18th July 1781; the *Fortuna*, *Kock*, 27th June 1795; and the *Freuden* otherwise *Freude*, *Backman*, 4th July 1795, in the same court. To which may be added what was laid by Lord Mansfield in *Giff v. Mason*, 1 T.R. 85. *viz.* "By the maritime law, trading with an enemy is cause of confiscation in a subject; but this does not extend to a neutral vessel."

(*a*) *Quare tamen.* See the case *supra*.
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plies with the 28 G. 3.? I think this question ought now at least to be quite at rest, two decisions having been already made upon this subject within the term; one in this court, and one in the King's Bench; both of which are directly in point. It may be material to remember, that previous to the passing of the 25 and 28 G. 3. many objections were made by the merchants, that policies in their frames were so loose and incorrect, that an underwriter had no opportunity of knowing the nature of the thing insured, or who the persons were for whom he insured. Great inconvenience arose, as appears by the preamble of one of the statutes (a), from the circumstance of many policies being made in blank, in consequence of which the underwriters were not led to the knowledge of any of the parties. I remember it was the conversation both in *Westminster-hall* and out of that place, that the underwriters wanted to know the name of somebody concerned, though it was not so material who that person should be. And why was this? It was because though they might not know the name of the principal, yet if they were in possession of the name of the person who brought forward the policy, they might have some confidence, that if that person was a merchant of character, or a respectable broker, he would not be engaged in a dishonest transaction: such as I remember to have been not unfrequent in the course of last war; viz. the insurance of ships and cargoes, which were only carried out for the purpose of being sunk. In this case the wish of the underwriters has been complied with, as well as what the Legislature thought fit to direct; for the name of the person immediately employed to effect the policy has been inserted. The case in the King's Bench goes farther than this, for there it was not even stated in the policy that the parties were *agents*, but only averred in the declaration that they were so; whereas here it is expressly said in the policy that *Barrett and Co.* effected the policy "as agents," by which is imported that they acted not on their own account, but on the part of somebody for whom they were concerned. The second question is, whether this policy on goods being *English* property, purchased since the

(a) 25 G. 3. c. 44. Whereas it hath been found by experience that the making or effecting insurances on ships or vessels, and on goods, merchandizes, and effects in blank, and without specifying therein the name or names of any person or persons for whose use and benefit, and on whose account such insurances are made and effect ed, hath been in many respects mischievous, and productive of great inconveniences, for remedy whereof, be it enacted, &c.

commencement of hostilities, and shipped at *Rotterdam*, be legal or not? Now, in the first place, I take it to be extremely clear, that this is not an insurance on enemy's property, and that we have nothing to do with that consideration here. Let us see what the case does state. It states that the goods were purchased for the Plaintiff at *Rotterdam* by his agent. But whose goods they were before they were so purchased is not mentioned. They might have been the property of *Danes* or *Swedes*, and then no objection could be made: or they might have been the property of an *Englishman*; for it appears by the case, that the Plaintiff's agent in *Holland* was an *Englishman*; and if an *Englishman* could buy goods in *Holland*, why could not an *Englishman* also sell goods there; and if these goods were bought of an *Englishman*, it is perfectly immaterial whether they were purchased in *England* or in *Holland*. I cannot distinguish this from the case put by my Brother *Heywood*. Suppose an *Englishman*, at the commencement of hostilities, to have goods in an enemy's country; may he not bring them away? In such cases a time is generally limited for the subjects of the state against which hostilities are commenced, to leave the country; and will it be said, that during that time, they may not carry away their goods? But I will go one step further. I will suppose that the party has stolen these goods; and that being in possession of them at the time of the policy made, he wants to bring them home. The underwriter will have no right to go into the state of the property previous to the time when he insured. Suppose certain requisites to have been necessary, by the law of *Holland*, to make a good sale in *Holland*, shall the underwriter say that the goods were not sold according to the law of *Holland*? Or if they were seized by a pirate, and sold by him to the Plaintiff, shall the underwriter set up that as a defence? These cases are too monstrous to bear consideration. What is the nature of the contract of insurance? It proceeds on this ground, that a party being possessed of goods which he wishes to bring home, desires to divide the risk with other persons. Whether the goods were improperly sold to him or not, provided he has paid the value, he is interested to the amount of them: and shall he not insure them? The underwriter cannot be permitted to go beyond the time when the goods were shipped. It has however been contended, that the subjects of this realm shall not bring home their own property from an enemy's country. Nothing but positive authority would warrant the

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Seeo. Vide.

Court in laying that down as law. If the subjects of this country have goods in an enemy's country, it is most clearly for the interest of this country that they should be able to bring them home. Independent of cases, we all know how frequently this subject has been canvassed. If we look into the Parliamentary Debates in 1746 and 1747, we shall see that Sir *Dudley Ryder*, Lord *Mansfield*, and the other great men of that time, argued the question entirely on its expediency, and held that it was good policy to permit insurances on enemy's property. In later times I well remember to have seen many policies tried professedly on enemy's property, without ever hearing the objection raised. Lord *Mansfield* did all in his power to prevent so dishonourable a defence being made. When the case of *Gift v. Mason* came on, I more than once conversed with Lord *Mansfield* on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said, that in former times it was considered for the interest of the country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always disconcerted any objection on that head. But he never went beyond the ground of expedience. At present I think such insurances are not expedient; the state of the countries at war is such as to make them otherwise. But the underwriters have taken care that such a case as this shall never arise again; for from the moment that any one underwriter succeeded on this kind of defence, there was an end of insurance on enemy's property. It is not however necessary to go into the ground of expedience: the illegality of such underwriting is now pretty well settled (*a*). The case cited from the *Cockpit* does not strike me as governing this. We have so loose an account of it, and are so much left to guess at the grounds on which the judgment was founded, that it can have no effect here. Indeed a very sufficient answer has been given to it, by observing that the documents appear to have been fraudulent. But let us see whether there are not other grounds on which it might have proceeded. In time of war subjects of *Great Britain* have an agent settled and permanently resident at their house of business in *Spain*, are dealing in articles of the produce of *Spain*, and are carrying on trade in order to make a profit of those goods, which is a very different case from this. Here no profit goes to the enemy. There a question might

(*a*) *Vide Park. Insur.* 239. 243.

have

have arisen, whether some of the partners, being resident in this country, should save the goods purchased by the house abroad; on which question considerable doubts might be entertained, nor am I now prepared to give an opinion upon it. Being therefore so little informed of the grounds of the decision at the *Cockpit*, and consequently not at all governed by it, I think it clear that this Plaintiff is entitled.

HEATH J. I am of the same opinion. With respect to the first point, as two decisions have already been made on the subject in this term, one in this court, and one in the King's Bench, it will not be necessary to say any thing. The second point turns on this question, whether the goods of a *British* subject purchased in any enemy's country, after the commencement of hostilities, may not be sent hither? It is clearly competent to a *British* subject to reside in *Holland* in time of peace, or to have a factor in that country; there has always been an *English* factory at *Rotterdam*, and this appears by some old acts of parliament to have been considered so meritorious, that the Legislature thought fit to legitimate the children of *English* subjects born there. That being so, if hostilities commence, must not the persons resident there bring their fortunes home? It is said that, in this case, the goods were purchased since the commencement of hostilities. But we must remember that a man cannot always remit his goods and effects to another country in specie. He must convert them into such goods as will be merchandizable in the place to which he wishes to remit them. It is not said that these parties carried on trade, but only that they bought these particular goods. Without therefore infringing on the general question, whether a *British* subject may carry on trade in an enemy's country in time of war (a), (which I should not wish to decide without the Court being full,) but steering clear of that general question, (which need not here be raised, as on the facts stated we shall rather intend for that against the insurer,) I think the Plaintiff ought to recover. The case cited from the *Cockpit*, gives me no satisfaction. The situation of the insurer will not be varied, whether the goods be purchased before or after hostilities.

ROOKE J. The objections which have been made by the Defendants do them no credit; and they ought not to have made them. First, it is clear from the words of the act, and from the decisions, both here and in the King's Bench, that the policy is

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(a) As to which vide *Park. Insur.* 237, 8, 9.

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well warranted in point of form; secondly, the Defendant was aware at the time he made the insurance what sort of contract he was entering into, and his defence is unconscientious, but having set up that defence we must give judgment on the point of law. I own that in reading this case I cannot decide it clear of the general question, whether it be legal to traffic during time of war with an enemy's country? The facts are so generally stated in the case, that they import to my understanding a general trading. The goods were purchased at *Rotterdam*, when they were purchased, when they were shipped, and when they were captured, open hostilities existed. Under these circumstances, if the Plaintiffs meant only to bring home their own property, it might have been so expressed. But being stated in this way, I think it of necessity brings on the general question; on which I am more ready to say that I have great doubts, as it will not affect the judgment in this case, my Brothers having already declared their opinion in favour of the Plaintiffs. Had it been necessary to give an opinion on that question, I should have wished for a further argument.

Judgment for the Plaintiff. (a)

(a) The Court was pressed by the Defendant to allow this case to be turned into a special verdict, in order that it might be carried into error, and it was stated that a special verdict being asked for at the trial, *Eyre Ch. J.* said that a case might be made, and afterwards turned into a special verdict if the Court should think it necessary; and

it was added in support of the application, that the other underwriters on the policy were ready to be bound by a decision in error on this case. But the Court being of opinion that the insured ought not any longer to be kept out of his money by this defence, refused the application.

Nov. 26th.

• *Eas.*, 181.
• *Bof. & Full.*
49. 246. 564.

If bail be put in without any description, one of whom proves to be clerk to an attorney, and the other a person in a low situation, Plaintiff may take an assignment of the bail-bond.

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BAIL in this case were put in within time, by the name of *Thomas Trimmer*, Gent. and *John Taylor*, Gent. without any farther description. The Plaintiff did not except to the bail; but finding on inquiry, that the former was clerk to the Defendant's attorney, and the latter a porter, watchman, and shoe-black, at *Clifford's-Inn*, took an assignment of the bail-bond, and proceeded upon it. To stay the proceedings on the ground of irregularity, a rule nisi having been obtained on a former day,

Le Blanc Serjt. now shewed cause, and contended that as an attorney's clerk could not become bail (a), the bail here put in

(a) *Vid. Hawkins v. Magnall, Doug. Corp. 828. Laing v. Gundall, 1 H. Bl. 76.*
467. and notes: *Boulogne v. Vautrin,*

migh

might be considered as a nullity, and an assignment of the bail-bond might be taken: he cited *Ritchie v. Gilbert, Imp. Prac. C.B.* 214. ed. 4. and *Price v. Oldfield, H. 37 Geo. 3. C.B.*

Shepherd contrâ admitted that an attorney's clerk cannot become bail, but insisted on the authority of *Thomson v. Roubell, Doug. 466.* note [1], that the only mode by which the Plaintiff could take advantage of that circumstance was by excepting to the bail: and that with respect to the second bail, to allow an assignment of the bail-bond on the ground of the facts disclosed in the affidavit, would be to try his sufficiency without bringing him up to justify.

But the Court said, that as the Defendant had practised a trick upon the Plaintiff, he should not avail himself of it, and

Discharged the rule with costs. (b)

(b) *Vid. Richardson v. Morris, 2 Bl. 1179.*

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DE GAILLON v. VICTOIRE HAREL L'AIGLE. (a)

INDEBITATUS assumpfit. The declaration contained the common money counts.

Plea: That the Defendant, before and at the time of the making the said several promises and undertakings in the said declaration mentioned, was and from thence hitherto hath been, and still is the wife of, and married to, one *John Martin Harel L'Aigle*, and which said *J. M. H. L'Aigle* is now living, to wit, at *Westminster*, &c.

Replication: That before and at the time of making the said several promises and undertakings in the said declaration mentioned, and from thence hitherto, the said *John Martin Harel L'Aigle* lived and resided in parts beyond the seas out of this kingdom, to wit, at *Hamburgh*, and that during all that time the said *Victoire Harel L'Aigle* lived in this kingdom, separate and apart from the said *John Martin Harel L'Aigle*, and followed and carried on the trade and business of a merchant as a single woman, and a sole trader, to wit, at *Westminster*, &c.; and that the Plaintiff did not give any credit to the said *John Martin Harel L'Aigle*, but traded and dealt with the said *Victoire Harel* as a feme sole, and on her sole credit; and that the said *Victoire Harel* made the said several promises and undertakings in the said declaration mentioned as such feme sole as aforesaid. And this, &c. wherefore, &c.

Nov. 27th.
11 East, 303.
Pofl, 368. S.C.
2 B&F. 5^o Pult.
227.
1 New Rep. 81.

If the husband reside abroad, and the wife trade and obtain credit in this country as a feme sole, she is liable for her own debts; but not unless she represents herself as a feme sole.

(a) *Vide ante*, p. 8.

▲ ▲ 3

To

CASES IN MICHAELMAS TERM

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—
DE GAILLON
L'AIGLE.

To this there was a general demurrer and joinder. *Runnington* Serjt. in support of the demurrer. The question here is, whether this Defendant being a married woman, and her husband resident abroad, is liable to be sued? On the pleadings it does not appear that her case comes within the exception to the general rule of law established by the modern cases of *Corbett v. Poelitz*, 1 T.R. 5. and of *Ringstead v. Lady Lansborough*, and *Barwell v. Brooks* cited (a) *ibid.* It is not stated here, that any permanent separation from bed and board was agreed upon between the parties, or any separate maintenance allowed; on which grounds the modern decisions have proceeded. Accordingly in *Gilchrist v. Brown*, 4 T.R. 766. a replication not stating a separate maintenance (b) was held bad; and in *Clayton v. Adams*, executor, 6 T.R. 604. Lord Kenyon thought that a feme covert would not be liable where the separation from her husband was only temporary. If the Court go so far as to determine that the mere circumstance of the husband being out of the kingdom (c) makes the wife liable, a feme covert may be subjected to an execution, by her husband quitting the kingdom, at a moment's warning. Nor will the trading averred in these pleadings make any difference; for no action lies against a feme covert trader, except by the custom of *London*, in which case the husband must be joined; whereas here the Defendant is sued as a feme sole. (d)

Marshall Serjt. contra, was stopped by the Court.

BULLER J. There is another set of cases of a very different nature from those which have been relied on by the Defendant; but which are much more applicable to this case. The first of these is the Lady *Belknap*'s case (e): now let us see if any sound distinction between that case and this can be maintained. The husband there was banished, but it is not stated whether he was banished for one year, or for five years, or for life (f): it

(a) Reported *Cooke B.L.* 26 and 29. *Weyland's* case, 19 Ed. I. *Ryley, Plat. Part* ed. 4th.

(b) *Vid. Winterbeim v. Lady Carlisle*, 1 H. Bl. 631. *Stetman v. Gob*, *Esp. Caf. N. P. 7 Elab v. Leigb*, 5 T.R. 679. *Thompson v. Hervey*, 4 Burr. 278.

(c) *Vid. Moor*, 851.

(d) *Vid. Lean v. Shutz*, 2 Bl. 1195., where, in an action against a feme covert with a separate maintenance, it was held that the husband should have been joined for convenience.

(e) 2 Hen. 4. 7. a. *Vide also the case of Lady Maltavers*, 10 Ed. 3. 53. *Sybelle Belknap's* case, 1 Hen. 4. 1. a. *Margery*

Weyland's case, 19 Ed. I. *Ryley, Plat. Part* 66. *Deerly v. Dutches of Mazarine*, *Salk.* 116. and 646. *Ld. Raym.* 147. *S.C. Comb.* 422. *S.C. and Countess of Portland v. Predgers*, 2 *Vern.* 104.

(f) It appears by the Year Book 1 Hen. 4. 1. a. that *Belknap* was banished to *Gaſtony*, there to remain till he obtained the King's favour: which Sir Edward Coke considers as a banishment for ever. *Co. Litt.* 133. 6. and adds, that if the husband by act of parliament have judgment to be banished but for a time, which some call relegation, that is no civil death. *Vid. tam. Hargrave's note* 209.

was held sufficient that he was in banishment at the time when Lady Belknap's contract was made; and I can see but one principle on which the case could have been decided; viz. that the rights known to exist in law between husband and wife were not interfered with, by allowing the wife to be taken in execution: as the husband was banished (though it be not stated whether for life or not) the matrimonial rights during his banishment were at least suspended. In later times the cases have gone further. In *Sparrow v. Carruthers* (a), it was shewn in answer to evidence of coverture that the husband was transported for seven years only, and after that time was expired he had a right to return, and demand the comfort of his wife, even if she were in gaol; yet the husband being abroad and not capable of enjoying the matrimonial rights, it was held that the disability of the wife was suspended. In those cases the husband was sent out of the country for his crimes, whereas here the husband has voluntarily abandoned his wife, and, for any thing that appears, never was in *England*, and perhaps never may come here. The wife has traded as a feme sole, has obtained credit as such, and ought to be liable for her debts.

HEATH J. I am of the same opinion. The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the feme covert that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood. The husband perhaps never was in *England*, and never may be, so that this case is not at all like those which proceeded on the ground of a separate maintenance.

ROOKE J. of the same opinion.

Judgment for the Plaintiff. (b)

(a) Cited in *Lean v. Shute*, 2 Bl. 1197. and in *Corbett v. Peinitz*, 1 T.R. 7.

by her during her husband's absence from this country, though at his departure he proposed returning in a short time, but had in fact been absent some years.

(b) Vid. etiam *Espin. Cif. N. P.* 554. *Watford v. Ducheſſe de Pierre*, whom Lord Kenyon ruled to be liable for debts contracted

LEADER v. DANVERS.

Nov. 27th.

COCKELL Serjt. moved for an attachment against the sheriff of *Leicesterſhire*, for having made an insufficient return to a writ of *venditioni exponas*.

he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of purchasers.

The Court refused to grant an attachment against the sheriff, because

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The Plaintiff having sued out a *fi. fa.* the sheriff returned that he had levied to the value of the sum indorfed, but that the goods remained in his hands for want of purchasers; upon which a *venditioni exponas* having issued, the sheriff returned, that he had sold a moiety of the goods levied, and that the remainder continued in his hands for want of purchasers. (a)

Cockell urged, that as no other writ could be sent to the sheriff while this *venditioni exponas* was in force, the goods under this return might remain in his hands for ever.

But the Court was of opinion, that the motion could not be supported, and that if the Plaintiff was dissatisfied with the return, he might set up a purchaser of the goods himself.

Cockell took nothing by his motion.

(a) *Vid. Clerk v. Witbert*, 6 Med. 293. *Alſi, Cameron et al. v. Reynolds*, Cowp. 406. —
2 *Ld. Raym.* 1075. S. C., where *Holt C. J.* where *Ld. Mansfield* says, that upon a writ —
says, "If a Sheriff seize goods to the value, of *venditioni exponas* the Sheriff must re—
and return it, he is bound to find buyers." "turn the money into court."

Nov. 27th.

2 *Easf.* 251.
3 *Camp.* 282.
In debt on bond, if one of the attesting witnesses be dead and the other beyond the process of the Court, it is sufficient to prove the hand-writing of the witness that is dead.
Qs. Whether evidence of a custom in *Jamaica* to execute bonds by substituting a mark with a pen for a seal, be admissible in support of a declaration on a bond sealed,
U. S.?

ADAM and Wife, Executrix, v. KERR.

DEBT on bond. The declaration was in the usual form, averring the bond to have been made and sealed by the Defendant, with a profert accordingly. Plea, non est factum.

The instrument in question was made in *Jamaica*, and attested by two witnesses, but being produced at the trial before *Rooke J.* at the *Westminster* sittings in term, appeared to have no seal, though a mark of a particular kind had been made with a pen, in the place where bonds are usually sealed. Evidence was admitted to shew a custom in *Jamaica* to execute bonds in this manner. One of the attesting witnesses having been proved to be dead, and the other to be resident in *Jamaica*, the hand-writing of the former only was established, and no evidence was given of the hand-writing of the obligor. Verdict for the Plaintiff, subject to the opinion of the Court.

Heywood Serjt. moved for a rule to shew cause why the verdict should not be set aside and a nonsuit be entered; and insisted, 1st, that the hand-writing either of the witness living in *Jamaica*, or of the obligor, should have been proved; 2dly, that the evidence of the custom in *Jamaica* should not have been admitted.

BULLER J. On the last ground there is no objection to the rule to shew cause being granted, but I am clear there is nothing in the first point. Where a witness is dead, the course is to prove his hand-writing. In this case one of the attesting witnesses was dead.

dead, and the other was beyond the reach of the process of the Court; the best evidence, therefore, which could be obtained was given (a). The hand-writing of the obligor need not be proved: that of the attesting witness, when proved, is evidence of everything on the face of the paper; which imports to be sealed by the party.

The Court accordingly granted a rule to shew cause on the last ground, but recommended the Defendant to accede to the terms of the Plaintiffs taking judgment without costs.

The cause being called on this day, Heywood for the Defendant assented to the proposal made by the Court, and on those terms the Rule was discharged.

(a) Vid. *Coglan v. Williamson*, Doug. 93. *Trompouky*, 7 T. R. 265. and *Wallis v. Holmes v. Pontin*, Peake N. P. 100. *Cooper Delancy*, ibid. n. (c).
v. Marfden, Espin. Caf. N. P. 2. Barnes v.

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ADAM
v.
KERR.

PIERSON v. GOODWIN.

Nov. 28th.

THE Defendant was arrested on the 8th of September 1797 by process out of the Court of King's Bench; on the 5th of February 1798 he was charged with a declaration; on the 8th of the same month he was removed by habeas corpus to the Fleet; judgment (which went by default) was not entered up till the 26th July, in the Trinity vacation following, and the Defendant was therefore supersedeable, according to the practice of both Courts: on this ground a summons for the 31st October was taken out before Lord Kenyon, for the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the Warden of the Fleet; this order, at the particular request of the Plaintiff's attorney, stood over till the 5th November; but between the 31st October and the 5th November the Defendant was charged with a declaration at the suit of the Plaintiff in an action on the judgment. The Plaintiff's attorney not attending to shew cause on the 5th November, an order was made for a *superfœdeas* to issue.

Le Blanc Serjt. this day shewed cause against a rule nisi for discharging the Defendant, in the action on the judgment, out of the custody of the Warden of the Fleet, on his entering a common appearance, and contended that the present application was not warranted by the rule made in Hil. 8 Geo. 2. (a), as that only extends to

(a) Ordered, that in all cases where a prisoner in the Fleet or other gaol or prison, is discharged or ordered to be discharged by *superfœdeas* for want of prosecution, and such prisoner be afterwards arrested or detained in custody, by action of debt brought upon judgment obtained in the cause

wherein such prisoner was so discharged, or ordered to be discharged, that a common appearance shall be accepted for the Defendant in such action of debt upon judgment. *Cooke's Rules and Orders, C. B. Imp. Pres. C. B. 178. ed. 4.*

causes

CASES IN MICHAELMAS TERM, &c.

1798. cases where the prisoner is actually *discharged or ordered to be discharged* before he is detained in an action on the judgment.

**PIERSON
v.
GOODWIN.**

Shepherd Serjt. in support of the rule.

HEATH and ROOKE J^s. (*absente Buller J.*) were of opinion that the actual discharge of a prisoner relates back to the time when he has a right to be discharged, *viz.* to the time when he is supersedeable, and that the practice of the Court was with the Defendant, and accordingly made the

Rule absolute. (a)

(a) *Vid. Foy v. Percy, T. 8 Geo. 3. C. B. Rose v. Chippingfield, 1 T. R. 591. and The et al. pror. Buller J. 1 T. R. 592. contrâ in London Assurance Company v. Perkins, cit. B. R. Hutchins v. Kenrick, 2 Burr. 1048. ibid.*

MICHAELMAS TERM, 39 Geo. III.

WHEREAS the Right Honourable the Lord High Chancellor hath been pleased, by an order bearing date the 12th day of July last, to direct that from and after such day no writ of *Dedimus Potestatum*, to be executed in *England*, shall issue under the Great Seal, directed to any persons except the Judges, Serjeants at Law, Barristers of five years standing, or Solicitors or Attorneys of some of the Courts in *Westminster-Hall*, the Judges of the Court of Session and Exchequer, Advocates and Clerks to the Signet of five years standing, in *Scotland*: It is ordered, that from and after the last day of this Term, no Common Recovery or Fine shall be suffered to pass, unless the taking of the Warrants of Attorney for suffering any Common Recovery or Caption of any Fine be before one of the Justices or Barons of His Majesty's Courts of Record in *Westminster-Hall*, or one of the Serjeants at Law, unless an affidavit be made and filed, stating that the Commissioners taking the same are, to the best of the Defendant's information and belief, either Barristers of five years standing, or Solicitors or Attorneys of some of the Courts in *Westminster-Hall*, the Judges of the Court of Session and Exchequer, or Advocates and Clerks to the Signet of five years standing, in *Scotland*.

F. BULLER
J. HEATH.
G. ROOKE.

Lord Chief Justice *Eyre* was absent during the whole of this Term, from indisposition.

THE END OF MICHAELMAS TERM.

C A S E S

1799.

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS

IN

Hilary Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

JONES v. CHUNE, One, &c.

Jan. 25th.

THIS was a motion to set aside the writ of inquiry executed in
this case for irregularity.

Judgment having been signed for want of a plea, notice was given that a writ of inquiry would be executed at the Secondaries' office in *Lothbury*, between the hours of eleven and one on a particular day. This notice was afterwards continued to a subsequent day, but in the notice of continuance no mention was made of the hour or place at which the writ of inquiry would be executed. The Defendant did not attend; and a verdict was found for *l. 17s.*

If notice of a
writ of inquiry
to be executed
at a particular
hour and place,
be continued,
the notice of
continuance
need not express
any hour or
place.

Shepherd Serjt. in shewing cause contended, that the notice of continuance was regular, as it necessarily referred to the time and place mentioned in the original notice, and added, that it was notorious that writs of inquiry always were executed between the hours of eleven and one, unless the convenience of both parties particularly required that it should be otherwise. He also relied on the circumstance of this being a small debt due to a tradesman, and that the Defendant having been summoned to the Court of Requests

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 v.
 CHUNZ.

Requests pleaded his privilege as an attorney, and forced the party to this more expensive proceeding.

Williams Serjt. contra contended, that notices of this kind were construed strictly, and that a notice of a writ of inquiry to be executed between eleven and two had been held bad (a). He urged also that as writs of inquiry are occasionally executed between four and six this notice of continuance was not sufficiently certain.

Sed per Eyre Ch. J. (after a reference to the officers, who said that the point had never been ruled, but that all the printed forms of continuances as well as of original notices express both the hour and place)—A more ungracious application never came before the Court. The justice of this verdict is not impeached, and the only question to be considered arises on the simple ground of a supposed irregularity in not mentioning the hour and place in the notice of continuance. Ungracious as it is, if this supposed irregularity is established on authority or on principle the Defendant must succeed. I am not satisfied however that it is supported by either. Though the printed forms do express the hour and place in the notice of continuance as well as in the original notice, yet the question is how far they are necessary, and what would be the effect of omitting them? Does the omission enable the Plaintiff to chuse his own time and place? If so, the objection would be well founded. I think that if an original notice be given specifying the hour and place as well as the day, and that notice be afterwards continued with an alteration of the day only, the latter will refer to the former and incorporate the hour and place: and that it would be an irregularity in the Plaintiff to execute his writ of inquiry at any other hour or place than those mentioned in the original notice.

Rooke J. I am of the same opinion. Had this application been made on the ground of the writ of inquiry having been executed at a different time and place from those mentioned in the original notice I should have thought it well founded.

Rule discharged with costs

(a) *Robinson v. Phillips*, *Prac. Reg.* 445. *Barnes*, 299. S. C. *Prac. Barnes*, 296. S. C. *Vide etiam Foffer v. Smalee*, *Barnes*, 295. *Hannaford v. Holman*, *ibid.* *Laff v. Denny*, *Barnes*, 302. *Prac. Reg.* 446. S. C. *Le Mark v. New-* man, *Com.* 551. *Barnes*, 299. S. C. *Prac. Reg.* 447. S. C. *Squire v. Almond*, *Barnes* 297. *Arnold v. Squire*, *Sayer*, 181. *Jom v. Fowen*, 2 *Stra.* 1142.

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STEVENTON, One, &c. v. WATSON and Others.

THE Plaintiff, who was an attorney, having delivered a bill of costs to the Defendants, the latter obtained Lord Kenyon's order for referring it to be taxed: before any taxation had taken place the Plaintiff commenced an action upon the bill in this court. *Le Blanc* Serjt. now moved for a rule nisi to stay proceedings in this action, and that the Plaintiff should pay the costs incurred subsequent to Lord Kenyon's order.

Sed per Curiam. If the order for taxation had been made in this Court an attachment might have been granted; but where an order is made by one of the Judges of the Court of King's Bench, and pending that order the party sues in another court, it is for the Court of King's Bench to enforce the order. We cannot prevent a party from pursuing a remedy to which he is entitled by law unless in so doing he incurs a contempt of this Court.

Le Blanc took nothing by his motion.

Jan. 26th.

This Court will not stay proceedings in an action on an attorney's bill, brought subsequent to the order of the Judge of another court for its taxation, but previous to that taxation having taken place.

JENKINS v. LAW.

Jan. 29th.

10 *E&B*, 358.
An affidavit to hold to bail stating the Defendant to be indebted "for damages awarded and for costs and expenses taxed and allowed," contending, that it did not appear that the award or taxation were made by competent authority.

Cockell Serjt. this day in shewing cause, urged that if the original affidavit should be deemed defective, still the Court would allow the Defendant to file a supplemental affidavit.

Eyre Ch. J. I am not satisfied that the original affidavit does not sufficiently alledge a cause of action. If a Plaintiff swear that a Defendant is indebted to him, "for goods sold and delivered" it is enough, and he need not set out so much of the transaction as will shew that it amounted to a legal sale, for he takes upon himself to say, that such a sale and delivery took place as constitute a cause of action. In the present case I think the word "awarded" is to be construed in its legal sense, and that the Plaintiff takes upon himself

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himself to say, that an award and taxation have been made upon which a right of action may accrue. If indeed the Court were not satisfied with the original affidavit, this would be precisely the case in which a supplemental affidavit should be allowed, because it would not in any degree vary the original affidavit, but only explain an ambiguity.

Per Curiam,

Rule discharged.

Jan. 29th.

DOBSON v. Sir WM. HERNE Knight and Another Sheriff of Middlesex.

The omission of
" and thereupon
" the said J. S.
" complains" in
the beginning of
a declaration of
trespass on the
case is no cause
of special de-
murrer.

ACTION on the case by the landlord of certain premises against the sheriff for removing the goods of his tenant under a *fa. fa.* without having previously paid to the Plaintiff three quarters of a year's rent then in arrear, according to the provisions of 8 Ann. c. 14. s. 1. The declaration began thus: "Sir W. H. "Knight and R. W. Esq. were attached to answer unto John "Dobson in a plea of trespass on the case for that whereas the "said J. D. heretofore to wit on &c. at &c. did demise and let "to one J. P. Gashiot a certain messuage" &c. stating entry and possession by him "and the said J. D. further saith that after "wards and during the continuance of the said demise" &c. proceeding to the end in the usual form.

To this there was a special demurrer, assigning for cause "that it does not appear in or by the said declaration that the "said John complains by attorney (a) or otherwise against the "said Sir W. H. and R. W. of or for the premises therein men- "tioned; and also for that the said declaration is merely by "way of recital, and does not contain any positive allegation "that the said Sir W. H. and R. W. committed the said several "supposed grievances therein mentioned: and also for that "the said declaration is in other respects uncertain, insufficient, "and informal."

Joinder in demurrer:

Shepherd Serjt. in support of the demurrer. The whole of *this* record is a mere recital of a writ having been sued out without any averment that the Plaintiff complains of or alleges any thing against the Defendant. The declaration should have been in *this*

(a) The omission of the attorney's christian name was held to be error in *Hewson v. Cole.* 1 Roll. 336.

form. "The Defendant was attached to answer the Plaintiff " in a plea of trespass on the case, and thereupon the Plaintiff " complains, &c." I do not mean to contend that it is necessary to state that the Plaintiff complains by attorney, though that is one of the objections stated in the special demurrer. Before the rule of Court 1654, s. 16. the writ was recited at length in all declarations as is now done in declarations in trespass only; and thereupon the Plaintiff made his allegations. By that rule the Plaintiff is allowed in all cases except trespass to state the writ shortly: but when he has so done he must make his complaint and allegations in the same manner as was necessary before the rule referred to. When pleadings were *ore tenus* the writ being returned and the parties having appeared, the Counter read the writ to the Court, and then mentioned the time, place, and circumstances contained in it, &c. and the particular damage accrued. *Gibb. C.P. 47. Ed. 2.* The present case stands as if the writ had been read but no count had followed.

Marshall Serjt. contra was stopped by the Court.

EYRE Ch. J. The Defendant's objection seems to be that there is no declaration: but I do not perceive that cause among the special causes of demurrer; the complaint is that the declaration fails in certain particulars, but the existence of a declaration is admitted. The first objection, *viz.* that the complaint is not made by attorney has been abandoned. The second objection is, that the declaration is merely by way of recital, and does not contain any allegation of the Defendant having committed the offences there mentioned. As to this I am of opinion that the allegation is positive enough. The Defendant's objections are not sufficient to entitle him to judgment; but as the declaration is drawn in a slovenly manner, and ought not to stand on the records of the Court, I think that the Plaintiff should have leave to amend without costs.

ROOKE J. Of the same opinion.

Leave given to amend without costs.

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Feb. 5th.

DE GAILLON v. VICTOIRE HAREL L'AIGLE.

At the execution
of a writ of in-
quiry after judg-
ment on demur-
rer it is not com-
petent to the
Defendant to
controvert any
thing but the
amount of the
sum in demand.

JUDGMENT having been given against the Defendant in this case on demurrer (*a*), the Plaintiff at the execution of a writ of inquiry proved that the Defendant had acknowledged the debt to a certain amount: the Defendant on the other hand adduced evidence to shew that she had only acted as agent for her husband. The under-sheriff directed the jury, that if they should be of opinion that the Defendant really acted in the transaction as agent for her husband, they ought to find a verdict for the Plaintiff with only 1*s.* damages. This they accordingly did.

Marshall Serjt. having obtained a rule to shew cause why the execution of this writ of inquiry should not be set aside on the ground of improper evidence having been admitted on the part of the Defendant,

Shepherd Serjt. shewed cause and contended that although the Defendant by demurring had admitted something to be due, yet that it was competent to her to shew that the particular debt proved by the Plaintiff was contracted by her as agent only, and was not the debt admitted by the demurrer.

But the *Court* were clearly of opinion that this evidence ought not to have been admitted; that the only question to be decided by the jury was the amount of the debt; and that the question whether the debt were contracted by the Defendant as agent for her husband, or in her separate capacity, must be taken to be determined by the record.

EYRE Ch. J. added: I am not aware that I have ever concurred in any decision in which it has been held that if a person describing himself as agent for another residing abroad, enter into a contract here, he is not personally liable on the contract.

Per Curiam,

Rule absolute. (*b*)

(*a*) Vid. *ante* 357. *Green v. Hearne*, 3 T. R. 301. and *Shepherd*
 (*b*) Vid. *Bewis v. Lindsell*, 2 Str. 1149. v. *Charter*, 4 T. R. 275.
Thelluffon v. Fletcher, *Dong.* 315. *Ed.* 3.

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PELL v. BROWN.

A RULE nisi having been obtained by Sellon Serjt. for referring a promissory note, on which judgment had gone by default, to the prothonotary to compute principal, interest and costs, Heywood Serjt. shewed for cause against it that the process was not served till two days after it was returnable.

But the Court were of opinion that while the judgment remained in force no cause could be shewn against this rule founded on any irregularity previous to the judgment; and that if the judgment had been irregularly obtained the Defendant might move to set it aside.

Feb. 8th.
Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary.

Rule absolute.

DOE ex dim. JOHN BAILEY v. ROE.

Feb. 9th.

KERBY Serjt. moved for judgment against the casual ejector, saying that as the affidavit of service of declaration was not in the usual form he would state the substance of it. The defendant went to the house of Thomas Bailey and Wm. Kirk the tenants in possession, and seeing two women in the house tendered and explained to them a declaration which they refused to accept and which he fastened on the premises; in returning he met Wm. Kirk, to whom he tendered and explained another copy which he likewise refused to accept, and which the defendant fastened on another part of the premises.

Service of a declaration in ejectment on one of two tenants in possession, is good service on both.

EYRE Ch. J. I do not know that we have ever construed the rule of Court so strictly as to hold that service on one of two tenants in possession may not be considered as a good service. In this case it is expressly sworn that a declaration was tendered to Kirk who refused to receive it.

Rule granted.

MENHAM, Assignee &c. of a BANKRUPT, v. EDMONSON. Feb. 9th.

TROVER for goods taken in execution at the suit of the Defendant. The cause was tried before Cooke J. at the Guildhall fittings in this term, when it appeared that the act of bankruptcy

It is no objection to a commission of bankruptcy that it was sued out with intent

to defeat a previous execution, if no collusion appear on the part of the bankrupt. If a creditor accompany the sheriff's officer in levying an execution which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees though he has never received either the goods or their value from the sheriff.

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was committed in *December 1796*; that in *June* following a commission was sued out, under which four or five creditors proved their debts: and that the debt of the petitioning creditor arose on two notes drawn by the bankrupt in his favour for a good consideration: that on the 30th *March* in the same year the goods in question were taken in execution at the suit of the Defendant who accompanied the sheriff's officer to see the writ executed.

At the trial it was objected by the counsel for the Defendant, that the action of trover was improperly brought; as it would only lie against the sheriff in whose hands the money levied by the execution remained. But this was over-ruled. It was then urged that the commission was fraudulently taken out for the purpose of avoiding the execution. The learned Judge left the question of fraud to the jury, having first observed that he thought the evidence preponderated in favour of the Plaintiff; that the act of bankruptcy took place three months before the execution was thought of; but that the commission was taken out in consequence of the execution, and that under all the circumstances the jury might perhaps be warranted in finding the bankruptcy fraudulent. Verdict for the Defendant.

Clayton Serjt. having on a former day obtained a rule to shew cause why this verdict should not be set aside and a new trial be had, on the ground of its being contrary to evidence, and in a great measure to the direction of the Judge,

Cockell Serjt. was now to have shewn cause.

Sed per EXRE C. J. I do not see sufficient ground for saying that the bankruptcy was fraudulent. There appears to be nothing beyond mere suspicion. It is indeed highly probable that the commission of bankruptcy was sued out in order to defeat the bill of sale made under the execution. This has I doubt not been frequently done, nor is there any injustice in it; one creditor endeavours to gain an advantage over the other creditors by taking his whole debt in execution; they on the other hand when they see all the effects likely to be swept away endeavour to set aside that execution by a commission, in order to obtain an equal distribution (*a*). It is also true that this *may be* done by the contrivance of the bankrupt, and the whole *may be* a collusion, in which case the Court will interfere. But where the parties before the Court are both creditors standing in an equal degree of right and equally entitled to favour, unless there be

(*a*) See the opinion of Ld. *Eldon* C. de- be done with the *privi*ty of the bankrupt. creeing differently, observing that it may 7 *Vez. Jun. 303.*

some

some circumstance of collusion on which we can place our finger, the bankruptcy must take effect. The question is not whether this commission has been taken out to avoid the execution, but whether it has been so taken out with the collusion of the bankrupt himself?

Cockell then desired to take the opinion of the Court on the point which had been mooted at the trial, *viz.* Whether trover could be maintained against the Defendant, or whether it should not have been brought against the sheriff, in the hands of whose broker the money remained? He cited *Rysh v. Baker, Bull. N. P.* 41.

EYRE Ch.J. I had some doubts at first as to this point, and whether the execution having been regularly made under the authority of the law, and the goods regularly sold, the action should not have been brought for the money. There is a fact however in the case which decides the point, namely, that the Defendant was in company with the sheriff's officer at the time of the execution. By the case cited it appears, that trover may be maintained against the party himself if he give a bond to the sheriff, because giving a bond is equal to intermeddling; actual intermeddling therefore must be equal to giving a bond (*a*).

Per Curiam,

Rule absolute.

(*a*) In the report of *Rysh v. Baker*, in "officer" though no mention is there made of *2 Stra. 996.*, it is said "that the action was any bond being given to indemnify the well brought against the Defendant, who sheriff. received the money without joining the

WHALLEY v. TOMPSON and Another.

Feb. 9th.

TRRESPASS for breaking and entering the Plaintiff's close. Pleas 1st, Not guilty. 2d, That long before the said times when &c. and long before the said Plaintiff had any thing in the said close in which &c. (to wit) on the 20th day of March in the year of our Lord 1753 one *Thomas Adderley Esq.* was at one and the same time seised as well of two closes situated in the parish of *Weddington* aforesaid formerly called the *Wood Close* and *Ox Close* and lately divided into four pieces and now known by the name of *Little Leyfield* and *Ox Meadow* as of and in the said close in which &c. in his demesne as of fee and that the said *Thomas Adderley* and all those whose estate he then had in the said close

One being seised in fee of the said joining closes *A.* and *B.* over the former of which a way had immemorially been used to the latter, devises to *B.* with the "appurtenances"; held that the devisee cannot under the word "appurtenances" claim a right of way over *A.* to *B.*, as no new right of way

is thereby created, and the old one was extinguished by the unity of feisin in the devisor.

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formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* from time whereof the memory of man is not to the contrary had used and enjoyed and was used and accustomed to have use and enjoy and the said *Thomas Adderley* had used and enjoyed by his farmers and tenants a certain way from the King's highway in the parish of *Weddington* aforesaid leading from *Nuneaton* in the county aforesaid to *Atherston* in the said county unto into through over and along the said close in which &c. to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* and from thence back again by the same way to the said common highway for himself and themselves and his and their tenants and his and their servants to pass and repass on foot and with their cattle carts and other carriages at all times as occasion required as an *easement and appurtenance* belonging to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* And the said *Thomas Adderley* being so seised as well of the said close in which &c. as of the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* and so having using and enjoying the said way as an easement and appurtenance belonging to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* afterwards (to wit) on the same day and year last aforesaid at *Weddington* aforesaid in the county aforesaid did duly make and publish a certain codicil to his last will and testament the said codicil being in writing and duly executed to pass real estates and did thereby (amongst other things) give and devise the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* with their and every of their appurtenances to the use of his sister *Elizabeth Liptrott* for and during the term of her natural life remainder to *Amicia Bracebridge* the then second and youngest daughter of *Philip Bracebridge* Clerk and the heirs of her body, remainder to the right heirs of the said *Philip* And the said *Thomas Adderley* afterwards and before the said times when &c. (to wit) on the 15th day of *February* in the year of our Lord 1757 at *Weddington* aforesaid died, not having revoked or altered his said codicil and so seised as aforesaid as well of and in the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* with the rights members and appurtenances thereunto belonging as of and in the said close in which

which &c. upon whose death the said *Elizabeth Liptrott* by virtue of the said devise afterwards and before the same times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and was thereof seized for and during the term of her natural life and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* (to wit) at *Weddington* aforesaid in the county aforesaid and the said *Elizabeth Liptrott* being so thereof possessed and so using and enjoying the said way afterwards (to wit) on the second day of *March* in the year of our Lord 1765 at *Weddington* aforesaid died, whereupon the said *Amicia Bracebridge* afterwards and before the said times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and became seized thereof to her and the heirs of her body and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* (to wit) at *Weddington* aforesaid in the county aforesaid. And the said *Amicia* being so seized as aforesaid and so using and enjoying the said way afterwards (to wit) on the 19th day of *September* in the year of our Lord 1769 at *Weddington* aforesaid in the county aforesaid intermarried with one *George Hemming Esquire* whereby the said *George* and *Amicia* in right of the said *Amicia* became and were and still are seized of and in the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* with all the rights members and appurtenances thereunto belonging to the said *George* and *Amicia* and the heirs of the body of the said *Amicia*, and had used and enjoyed by their farmers and tenants the said way as an easement and appurtenance belonging to the same. And being so thereof seized and so using and enjoying the said way as last aforesaid the said *George* afterwards and before the said times when &c. (to wit) on the first day of *January* in the year of our Lord

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1796 demised the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* with all the rights members and appurtenances thereunto belonging to one *Thomas Tompson* the elder, who thereupon entered into and became and still is possessed of the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* together with all rights members and appurtenances thereunto belonging and held used and enjoyed the said way as aforesaid and being so possessed thereof the said Defendants as servants of the said *Thomas Tompson* the elder and by his command at the said several times when &c. passed and repassed on foot and with horses mares geldings carts and other carriages from the said King's common highway in the said parish of *Weddington* unto into through over and along the said close in which &c. to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* and from thence back again by the same way to the said common highway as occasion required using the said way as an *easement and appurtenance* to the said closes formerly called the *Wood Close* and *Ox Close* and now called *Little Leyfield* and *Ox Meadow* as it was lawful for them to do for the cause aforesaid. And this &c. wherefore &c.

General demurrer and joinder.

Le Blanc Serjt. was this day to have argued in support of the demurrer on these grounds, viz. that *T. Adderley* could not prescribe for a right of way over his own foil; that he could not have the way as an easement or appurtenance belonging to one close while he was seised in fee of both, since whatever right of way might have existed while the closes were separate property was extinguished by the unity of seisin (a); that being extinguished therefore it did not exist as a right of way, easement, appurtenance or

(a) See this position supported by several cases collected in *Vin. Abr.* Extinguishment, (A. & C.) But it appears that there is a distinction between rights which are of necessity and those which are merely by way of easement; the former are not destroyed by unity of seisin; as a way to church or market, *1 Rol. Abr.* Extinguishment, 936. *1.1. Sury v. Pigot, Popb. 172.* per *Dodderidge J. 3 Bulb. 340.* S. C. *Ney 84.* S. C. or a gutter carried through an adjoining tenement, *11 H. 7. 25.* or a watercourse running over the adjoining lands. *Sury v. Pigot, Popb. 166.* *Latch 153.* S. C. *3 Bulb. 340.* S. C. though that is also said to be because it hath its being not by prescription but *jure natura, per Wllock J. S. C.* So things not issuing out of lands as parts of the profits but due in another respect, though taken within the lands, are not extinguished by unity of possession, *Dav. 5, 6. as warren 35 H. 6, 55, 56.* *Dyer 327.* franchises waife, stray, wreck, leet, &c. Nor things which are part of the profits of the land and payable by such person only who has the land, if they commence upon any personal respect, and not in respect of the land, and so that the person only is charged, and not the land, as annuities, tithes, provosts &c. *Dav. 5, 6.*

any

any species of property corporeal or incorporeal, which could pass by the will of *T. Adderley* under the word "appurtenances" supposing that word to be sufficient to carry it; that not being stated as a way of necessity it could not be raised by operation of law: and not being given by express words the devisee could not take it as a new grant.

Williams Serjt. contr^u (being called upon by the Court, who inclined against the plea in bar, to state the grounds on which he meant to defend it). The Court will not on a general demurrer, take notice that this right of way in *T. Adderley* is informally pleaded *viz.* by way of prescription. The averment in substance amounts to this; that *T. Adderley* for a long time previous to the devise used a way over the *locus in quo*, to the close devised, as an easement and appurtenance to the latter. By the devise therefore of "*Leyfield* and *Ox Meadow* with their and every of their appurtenances" the way in question may well pass; the word "appurtenances" being clearly sufficient to carry a right of way. *Plowd.* 170. Suppose a man being possessed of two closes with a causeway leading over one into the other, alienate the latter; after which the alienee use and enjoy the causeway for forty years; would he not have obtained a good right of way? Such a user would be sufficient evidence to support an action on the case by the alienee, for any interruption of that right. Now in this case the deviser died in 1757; the devisee for life entered and enjoyed the way till his death, upon which the remainderman entered and has enjoyed it from that time to this. Then is it consistent to say, that the Defendant might maintain an action for the interruption of this way, and yet that he cannot use it without being subject to an action?

Eyre Ch. J. There can be no doubt that the word "appurtenances" may convey an existing right of way. But from the moment that the possession of two closes is united in one person, all subordinate rights and easements are extinguished. The only point therefore that could possibly be made in this case is, that the ancient right which existed while the possession was distinct was merely suspended, and may revive again. If it be stated, that a man and his ancestors have been in possession of two adjoining closes, and a prescription be then set up for a way over one to the other, that prescription will be *felo de se*.—If indeed the fields were let to different tenants, and from time immemorial a causeway had been built over one field to the other, by which the tenants had

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passed and repassed, this in user and in fact would be a road, but there would be no right to a road in point of law, for no right could exist in the owner independent of the fee-simple. If an alienation of one of the closes was to take place, and the alienee were afterwards allowed to use the causeway, a right might possibly grow out of such user to him; but that is not the case on this record, and unless the claim of these Defendants can be put in some legal form it will not avail them. Circumstances thrown into the record, which might possibly be sufficient to support an action on the case, will not necessarily be an answer to an action of trespass. I admitted, during the argument, that the word "appurtenances" would carry any easement or legal right. Upon that it was observed, that if the road in question had been described in the devise it would have passed: and that observation was followed up by a question, Whether the word "appurtenances" would not carry any easement or right that would pass by a particular description? To which I answer, that its operation must be confined to an old existing right, and that if the right of way had passed in this instance it must have passed as a new easement (a). Had the devise been "with the way now used" it would certainly have been a devise of the close A. with an easement newly created. The word "appurtenances" in this will had nothing to operate upon.

*Per Curiam,**Judgment for the Plaintiff.*

(a) A way to a mill having been extinguished by unity of possession in J. S., he died; whereupon partition was made between his daughters; the mill and way were assigned to one and the land to the other: hold that the way was revived: *Item videtur* that it is a new way. *Bre-Abr. Extinguishment*, pl. 15.

Feb. 9th.

Ex parte GRACE.

If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial he must take it upon himself.

ONE *Harrison* being possessed of a beneficial lease under the trustees of a charity, died leaving his widow administratrix of his effects. By his death Mrs. *Harrison* became entitled to the lease jointly with *E. T. Harrison*, her son by the deceased, and then an infant. Soon afterwards Mrs. *Harrison* married *W. Grace*, who as her husband having taken possession of the above-mentioned lease and title deeds, on the approaching expiration of the lease (and

during

during the infancy of *E. T. Harrison*) treated with the trustees for a renewal of it to himself only, and in his own name; this he accordingly obtained. *W. Grace* having afterwards become a bankrupt, his assignees took possession of the lease and were proceeding to sell it for the benefit of the estate, when *E. T. Harrison* having attained the age of twenty-one, claimed his proportion of the money arising from the sale of the lease. This matter having been referred to arbitration, an award was made in favour of *E. T. Harrison*.

Shepherd Serjt. on a former day obtained a rule to shew cause why this award should not be set aside, and now contended, that no trust resulted to *E. T. Harrison* by operation of law, but that the lease which *W. Grace* had obtained must be considered as his sole property, since there was no covenant for renewal in the original lease. He urged that *W. Grace* by stipulation with the trustees had been obliged to lay out money on the estate without being able to ascertain whether *E. T. Harrison* would assent to it, and that the principle of this award would enable an infant in such a case to claim a benefit if the lease proved to be beneficial, and if otherwise to refuse his concurrence and throw the whole burden on the trustee.

Sed per Eyre Ch. J. These arguments might have weight if it were now to be decided for the first time whether a person renewing a lease in which he is partly interested, and in which another person (that person being an infant) is also partly interested, shall or shall not be considered a trustee. The point has been decided at least forty times. *Grace* took the lease at his own peril; if it had not turned out beneficial he must have sustained the loss, but as it is a beneficial lease it must be for the benefit of the trust. This is the peculiar privilege of the unprotected situation of an infant. In the present case it has clearly proved a beneficial lease, or this application would not have been made to the Court. As to any sums which may have been paid for the renewal of the lease, or laid out in consequence of it, *E. T. Harrison* must contribute his due proportion before he can claim any advantage, and as the fund is in the hands of *Grace* he may do himself justice. The point is perfectly familiar; the trust arises by implication of law, and is not within the Statute of Frauds. If *Grace* thinks himself aggrieved he may apply to a court of equity, which is more competent to discuss this question; but to me it appears that the award is both equitable and just, and not to be controverted.

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Shepherd then added, that the assignees only wished to take the opinion of the Court, and would be perfectly satisfied.

Rule discharged.

Per Curiam,
Le Blanc Serjt. in support of the award.

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KITCHEN v. BLANCHARD.

A Defendant cannot demand a bill of particulars till after appearance.

MARSHALL Serjt. this day supported a rule for setting aside an interlocutory judgment, by shewing the following supposed irregularity, *viz.* The Defendant before appearance demanded a bill of particulars under a Judge's order; previous to the expiration of which order the Plaintiff signed judgment for want of a plea. He contended, that a Defendant need not appear till he has actually obtained the particular; since the particular when obtained may afford a reason for not proceeding in the action, if the demand appear to be just.

The Court being of opinion that the Defendant has no right to demand a bill of particulars till he has appeared,

Discharged the rule.

Feb. 11th.

PAGE v. SIR JOHN EAMER Knight, and Another.

The action on the case against the sheriff for taking insufficient pledges in replevin ought to be brought by the person making cognizance where there is no avowant on the record.

THIS was an action on the case by the Plaintiff, who had made cognizance as bailiff of one *Alexander Blair Esq.* in an action of replevin, against the Defendants as sheriff of *Middlesex*, for having taken insufficient pledges.

Plea. General issue.

This cause was tried before *Buller J.* at the *Westminster* fittings after last *Trinity Term*, when it was objected that the action would not lie in the name of the person making cognizance, but ought to have been brought in the name of the landlord. The learned Judge however observing, that the objection was on the record, and might be the subject of a motion in arrest of judgment: the cause proceeded, and a verdict was found for the Plaintiff. Damages £120.

Accordingly a rule *nisi* for arresting the judgment having been obtained in last term,

Shepherd Serjt. now shewed cause. The only question in this case is, whether the person making cognizance be competent to maintain this action? Now as it is in the election of the Plaintiff in replevin to declare against the bailiff only, or to join the landlord with him, if the bailiff be not competent to maintain this action, the Plaintiff in replevin will always have it in his power to exempt the sheriff from being responsible for taking insufficient pledges. At common law the sheriff was bound to take pledges for prosecuting the replevin: by the stat. of *Westm. 2. c. 2.* he is directed not only to take pledges for the prosecution but for the return of the distress, if it shall be awarded. On the construction of that statute it has been held, that an action will lie against the sheriff if he take insufficient pledges; and if an action will lie on that statute, in whose favour can it lie but in his who is entitled to a return of the distress? Now the Plaintiff in replevin having in this case declared against the bailiff, he alone is entitled to the return. By the case of *Blackett v. Crisop, 1 Ld. Raym. 278.* it appears, that when the sheriff takes a bond for the return of the distress he does it by virtue of stat. *Westm. 2.* Now the 11 Geo. 2. c. 19. s. 23. directs, that such bond may be affigned to the avowant or the person making cognizance, meaning thereby to give the party entitled to the return of the distress, an action on the bond against the sureties in his own name, instead of his action in the name of the sheriff. If then these sureties had been sufficient there is no doubt but that the person making cognizance would have had a right of action on the bond against the sureties. Now on the construction of stat. *Westm. 2.* the sheriff stands in the place of the insufficient sureties, and is responsible for their default. On principle therefore the person making cognizance is not only entitled to bring this action, but is the only person who can maintain it. The sheriff is responsible for the insufficiency of the pledges; the pledges bind themselves for the return of the distress; and the person to whom they are to answer, is he who alone can demand the return, viz. the party making cognizance, who alone is entitled to sue the writ *de retorno habendo.* Moreover the sureties for the prosecution are answerable not only for the return of the cattle but also for the costs of the action of replevin; and the only person entitled to those costs is the Defendant in replevin. [The Court observed, that at common law the pledges were only bound to answer for the amercement *pro falso clamore:* but that as the security

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security is now taken by bond, the Court will not relieve against the penalty without obliging the surety to pay costs.] The judgment in replevin is singularly constituted: it is a double judgment, that the Defendant have a return, and that he recover the arrears of rent, though the proceeding be under the stat. 17 Car. 2. c. 7.: and the reason for retaining the old form in addition to judgment for the recovery of the money, is stated in *Cooper v. Sherbrooke*, 2 Wilf. 117. and *Baker v. Lade*, Carth. 254.

Cockell Serjt. in support of the rule. The objection to the Plaintiff's recovery is, that he has no interest in the suit. Now it is essential in an action on the case that the party complaining should prove himself to be really damnified. The landlord alone is entitled to the distress, and the bailiff is merely his instrument for the recovery of it. If a return be made, it is to the landlord's advantage; he therefore alone is substantially interested in obtaining it. No argument in the Plaintiff's favour can be drawn from that part of the 11 Geo. 2. which directs that the bond may be assigned to the party making cognizance; since it by no means follows from the express provisions of that statute that he would be entitled to any action independent of the act. The case stands on the principles of the common law and the construction of the stat. *Westminster*, there being no authorities upon the subject. The action is brought against the sheriff, because the landlord is injured; then upon what principle can the bailiff be allowed to maintain it? If he recover damages he will not be entitled to retain them, but must pay them over to his principal.

EYRE Ch. J. I am very glad to find that the case is not encumbered with any authorities which might be supposed to stand in the way of plain justice and good sense. Independent of authorities, it appears to me one of the clearest cases that ever came before the Court. It is admitted that the Plaintiff in replevin may declare against the bailiff, without putting any person on the record to stand in the situation of avowant. Now by the course of the proceedings in replevin it appears clearly, that if the action be brought against the bailiff alone, and he maintain his cognizance, he will be entitled to judgment and to have the writ *de retorno habendo*. The law gives him a right to the possession of the goods, and if the sheriff return that the goods are eloigned, is not the bailiff damnified in being deprived of that possession to which the law has given him a right, or shall the judgment which he has obtained

obtained be altogether defeated, because there is a trust and confidence existing between him and another person? It being once established, that the action of replevin will lie against the bailiff alone, and that he may have the writ *de retorno habendo*, all the rest follows as a necessary consequence. It is immaterial to the sheriff who brings the action, since he can be answerable but to one person, and that must be the person on record. I am perfectly satisfied on principles of reason and good sense, independent of the last statute, that the person making cognizance is the only one entitled to bring this action, and that if the landlord himself had brought it, we should have been obliged, however unwillingly, to have given judgment against him.

ROOKE J. I am clearly of the same opinion. The bailiff was the party on record in the action of replevin, the only person entitled to a return of the distress, and therefore the proper person to bring this action.

Rule discharged. (a)

(a) When this motion first came on, the following case was referred to by Mr. Just. Buller, from the paper-book in his possession.

Archer and Others, Affignees, &c. v. Dudley and Others, E. 22 Geo. 3. B. R.—Debt by the Plaintiffs as affignees of H. C. W. Esq. late sheriff of Shropshire, secundum formam statutis, they being infants, and appearing by Sarah Barone's Archer their procuratrix amici, and complaining for that whereas J. D. complained to the said H. C. W. against the Plaintiffs, for taking and unjustly detaining certain goods and chattels of the said J. D. and prayed that they might be replevied and delivered to him; whereupon the said H. C. W. took from the said J. D. and the two other Defendants as responsible sureties, a bond in double the value of the goods so distrained (that value being ascertained by the oath of a credible witness) the condition of which was, that if the said J. D. should appear at the next county court to prosecute his action with effect against the Plaintiffs, and also make a return of the goods and chattels, if a return should be adjudged, and also keep indemnified the said H. C. W. and his deputy and bailiffs, touching the replevin, then the obligation to be void, or else, &c. Proferit, &c.—And thereupon H. C. W. replevied the goods, &c. and J. D. at the next county

court came in his own proper person and levied his plaint against the plaintiffs, and removed the record by *re-fa.lo.* into K.B. and complained, &c. (here followed the declaration in replevin against the Plaintiffs and T. Hunt their bailiff, imparlance prayed by them and obtained, avowry by the present Plaintiffs and cognizance by T. Hunt for rent in arrear, future day to plead prayed by J. D., his non-appearance and consequent judgment *pro retorno habendo* to the present Plaintiffs); and Plaintiffs averring that J. D. made no return, by which the bond became forfeited to the said H. C. W., set out the assignment by him of the bond under the statute to themselves. By means whereof, &c. and by force of the statute, &c. *actio accredit, &c.*

Plea. And the said J. D., J. C., and H. W. in their own proper persons come and pray judgment of the aforesaid bill because they say that the said T. Hunt in the said bill mentioned against whom the said J. D. levied his aforesaid plaint as well as against the said Plaintiffs in manner aforesaid and who as their bailiff well acknowledged the taking of the aforesaid goods and chattels in the said condition of the said writing obligatory and bill mentioned in manner and form as in the said bill is alledged and to whom as a person making such cognizance as aforesaid the aforesaid writing obligatory was or ought

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to have been affixed as well as to the said Plaintiffs according to the form of the aforesaid statute, at the time of the exhibiting of the bill aforesaid of the said Plaintiffs was and still is living and in full life to wit at &c. And this, &c. Wherefore inasmuch as the said Thomas is not named in the said bill they the said J. D., J. C., and H. W. pray judgment of the said bill and that the same may be quashed &c.

To this there was a general demur and joinder therein.

The Court were of opinion that the avowants being the parties interested, and the person making cognizance a mere man of straw, the replevin-bond might well be affixed under 11 Geo. 2. c. 19. to the avowants only, without the cognizor, and accordingly gave

Judgment of *respondeat scilicet*.

Feb. 12th.

HOPKINS v. SHROLE.

The Court will not stay proceedings in an action of replevin, unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin with costs up to that time.

THE Plaintiff who was tenant to the Defendant, not having paid his rent when it became due, was distrained upon; soon after the rent was tendered together with the costs, but being refused by the Defendant, the Plaintiff replevied and entered into the usual bonds to prosecute his suit, which he accordingly did.

Williams Serjt. on a former day moved to stay proceedings in the action of replevin, on payment by the Plaintiff of the rent in arrear, together with costs up to the time of the tender made. He cited *Vernon v. Wynne*, 1 H. Bl. 24. and observed, that as the Plaintiff was obliged by the replevin bond to proceed, he ought not to be called upon to pay the costs of the action.

Sed per Curiam. There is no ground on which we can allow this application (a). If a tenant neglect to pay his rent when due he must suffer for it. In *Vernon v. Wynne* the motion was made on payment of the costs of the action.

Williams on hearing this moved to stay proceedings on payment of the rent in arrear and costs up to the time of the application; and accordingly a rule *nisi* was granted. Against this *Heywood* Serjt. now shewed cause, and objected that the motion was only made to defeat the Defendant in replevin of his double costs, and that the Plaintiff ought therefore to pay the costs out of pocket. He suggested that another object might be to prevent the avowant going to trial at the next assizes, since perhaps the Plaintiff would never draw up his rule.

(a) Tender upon the land before a distress maketh the distress tortious; tender after the distress and before the impounding, maketh the detainer and not the taking wrongful; tender after the impounding maketh neither the one nor the other

wrongful, for then it comes too late; because that then the case is put to the trial of the law, to be there determined. 8 Co. 147. a. *Six Carpenters' case*, 5 Co. 76. a. *Pilkington's case*, 2 Inst. 107.

The

The Court however thinking the application reasonable made the rule absolute on the following terms.

On payment within a fortnight of the rent due, and costs up to the present time, including the costs of the application, all proceedings to stay, and that if the money be not paid within a fortnight, the avowant to be at liberty to proceed, and the Plaintiff to plead in bar *instanter* and take short notice of trial.

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ROGERS v. JENKINS.

No. 12th.

A *Clavsum fregit* having issued against the Defendant at the suit of *T. Rogers* and *J. Barber*, a summons was made out in the sheriff's office at the suit of *T. Rogers* only, and served on the Defendant; to which he entered an appearance: on discovery of the mistake another summons was made out at the suit of both Plaintiffs, and served on the Defendant, but not till four days after the writ was returnable; to this no appearance was entered: a declaration was afterwards delivered in the name of both Plaintiffs, and judgment was signed for want of a plea. *Le Blanc* Serjt. having on a former day obtained a rule *nisi* for setting aside this judgment for irregularity,

If process be served in the name of one Plaintiff, and declaration be delivered in the name of two, it is bad.

Runnington Serjt. now shewed cause, and contended, 1st, That any irregularity in the service of the process was waved by appearance (a). 2dly, That the variance was immaterial, it having been determined in *Hally v. Tipping*, C. B. 3 Wilf. 61. that if a Plaintiff arrest a Defendant in his own right, he may declare against him as executor if he will waive his bail, and in *Lloyd v. Williams*, C. B. 3 Wilf. 141. 2 Black 722. S. C. that a Plaintiff who has sued out a *capias* in his own name, may declare *qui tam*. (b)

Sed

(a) Vid. *Fox v. Money*, ante, 250. and *Davis v. Owen*, ante, 344. But a defect in proceedings cannot be waved. So the writ may be general and the count as executor or assignee of the sheriff, *Hainey v. Sparling*, 10 Geo. 3. C. B. *Imprey's Pract.* C. B. ed. 4. p. 233. *Goodwin* q. t. v. *Parry*, 4 *Term Rep.* 577. and *Hufsey v. Wilson*, 5 *Term Rep.* 254.

(b) Vid. etiam *The Weavers' Company q. t. v. Forrest*, 2 *Str.* 1232. But where the process is to answer the Plaintiff in a special character, he cannot declare generally. Thus, if the process be *qui tam*, *Canning v.*

Davis, 4 *Burr.* 2417. or in the names of assignees, *Meggs* and Another, Assignees of *Cochran, v. Ford*, E. 25 Geo. 3. *Tidd Pr.* 225. in *notis*, the Plaintiffs cannot declare in their own characters. It is said however in the case of *Lloyd q. t. v. Williams*, as reported 2 *Bl.* 722. that *Yates* J. in the case of *Canning v. Davis*, made this distinction, that though a Plaintiff style himself executor or give himself any other superfluous description in the process it will not hurt, for the demand is still the same, but that in the case before him the very nature of the demand was altered, the process

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Sed per EYRE Ch. J. The Defendant has appeared to a suit commenced against him by *T. Rogers*, and now he is declared against by *T. Rogers* and *J. Barber*. The question is, whether the declaration be warranted by any process? It is a very different case where a Plaintiff sues out a writ as executor, to which the Defendant appears; for in such case the Defendant is before the Court, at the suit of the person named in the writ, whether that person declare in his own right or in *auter droit*. The Defendant in this case has never been called upon to answer *J. Barber*, who cannot therefore require him to put in a plea.

Per Curiam,

Rule absolute.

cess importing a demand to the King and the Plaintiff, and the declaration a demand to the Plaintiff only. It was agreed by all the Court in *9 H. 5. 5.* that a man may bring a writ of trespass as executor for taking goods, and declare in his own right. And *Broke* says that it was the better opinion of the Court in that case, that a man might have a writ in debt as administrator and count for his own debt. *Bro. Administrator*, 21. *Nuxation and Surplusage*, 11 & 18. *Date*, 78. The title of executor

or administrator was considered in *9 H. 5. 5.* as a superfluous addition by those who thought that the writ was good, for they compared it to the addition of Carpenter, &c. If a writ be sued out as executor, and Plaintiff declare in his own name, the Court will discharge Defendant. *Douglas v. Islam*, 8 T.R. 416, or *vice versa* if the writ be in Plaintiff's own name and the declaration as executor. *Turing v. Jones*, *Diit. P. C. 5 T. R. 402.*

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2 *Bof. & Pull. 55.*
1 *New Rep.*
308.

The mere acknowledgment of the wife of the tenant in possession that she has received a declaration in ejection will not bind the husband.

GOODTITLE ex dem. READ v. BADTITLE.

L^E BLANC Serjt. moved for judgment against the casual ejector on an affidavit of service, stating that the deponent went to the house in question, in order to serve the declaration, and was there informed by the niece of the wife of the tenant in possession, that the tenant and his wife had been from home above three weeks, and that she did not know where they were gone, or when they would return; that the deponent thereupon served a copy of the declaration on the niece, and nailed another copy to the door of the house: and that the tenant's wife afterwards acknowledged to the deponent, that the declaration had come to her hands, and that she had sent the same to her husband.

EYRE Ch. J. If a declaration be served on the wife of the tenant in possession, and she neglect to deliver it to her husband, he must answer for her default (*a*). But it would be going further than we have ever yet gone to admit the mere acknowledgment of the wife to bind the husband.

Le Blanc took nothing by his motion. (*b*)

(*a*) *Goodright and Waddington v. Tbrush*-
out, 2 Bl. 800.

(*b*) But service on the wife on the pre-

misses is sufficient. *Smith ex dem. Lord Steurton and others v. Hurff*, H. Bl. 644.

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GOODTITLE ex dem. ROBERTS and Wife v. BADTITLE.

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To support a similar motion to that made in the last case *Le Blanc* Serjt. produced an affidavit of service, by which it appeared, that the declaration was served on one *John Rumbold Leeds*, who informed the deponent, that there was no tenant in possession of the premises (which consisted of a large wood) but that he was appointed by the Court of Chancery to manage the same for the benefit of a minor, to whom it belonged, and that he cut and sold the underwood.

Service of a declaration in ejectment on a person appointed by the Court of Chancery to manage an estate for an infant, is not sufficient.

The Court were of opinion that this service was insufficient: and that it amounted to no more than a service on a gentleman's bailiff.

Le Blanc took nothing by his motion. (a)

(a) But a notice to quit given by a receiver appointed under an order of Chancery, though it make no mention of the landlord, is sufficient to support an action for double rent under 4 Geo. 2. c. 28. *Wilkinson v. Colley*, 5 Burr. 2694.

Mr. Justice BULLER and Mr. Justice HEATH were absent during the whole of this term from indisposition.

In this term JOHN VAUGHAN of *Lincoln's-Inn*, Esq. was called to the Honourable Degree of Serjeant at Law, and gave rings with this motto,

“ *Paribus se legibus ambo.*”

END OF HILARY TERM.



C A S E S

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ARGUED AND DETERMINED

IN

THE COURTS OF COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

PEETERS v. THROGMORTON.

April 10th.

ISSUE having been joined in *Trinity* term last, but no notice of trial given, the Defendant in *Hilary* term ruled the Plaintiff to enter the issue, and then obtained a rule *nisi* for judgment, as in case of a nonsuit.

Runnington Serjt. shewed cause in *Hilary* term, and contended, that it was not competent to the Defendant to move for judgment as in case of a nonsuit in the same term, in which he had ruled the Plaintiff to enter the issue, since it would be obliging the Plaintiff to take two steps in one term. One of the Secondaries also stated the practice to be for the Defendant in such cases to wait till the next term.

Marshall Serjt. contra insisted, that as soon as the issue is actually entered, the Defendant has a right to move for judgment as in case of a nonsuit.

The Defendant may rule the Plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same term.

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EYRE Ch. J. This is not obliging the Plaintiff to take two steps. The question is, whether the Defendant be not entitled to avail himself of the Plaintiff's having omitted to take one step, *viz.* to give notice of trial, within the number of terms prescribed, as soon as he has brought himself into a situation to make the application? The motion proceeds on the ground of a neglect in the Plaintiff which has already taken place; and though the Defendant cannot move till the issue is in court, yet the delay of the Plaintiff is not purged by the Defendant's omitting to give a rule to enter the issue at an earlier period. Unless the practice be most clearly settled I never can yield to the objection.

ROOKE J. however entertaining some doubts upon the practice, the case stood over till this term; when the *Court* over-ruled the objection. And **Roode** J. added, that he entirely agreed in the reasoning of the Lord Chief Justice, though as the practice had been supposed to be the other way, he had wished the point to be considered.

Rule absolute.

April 11th.

5 Term Rep. 143.

3 Eq. 5316.

2 Bef. & Pull.

249.

An action on the case will not be against a party suing out a writ, if he neglect to countermand it after payment of the debt: at least unless malice be averred. Reasonable time is a question of law.

SCHEIBEL v. FAIRBAIN and Another.

THIS was an action on the case. The declaration stated, that the Plaintiff being indebted to the Defendants in the sum of 223*l.* 9*s.* 2*d.* the Defendants sued out of this court a writ of *capias ad respondendum* to hold the Plaintiff to bail; that the Plaintiff afterwards paid to the Defendant the debt, and that thereupon "it became the duty of the said Defendants to have forthwith countermanded the arrest of the said Plaintiff upon or by virtue of the said writ, yet the said Defendants, well knowing the premises but not regarding their duty in this behalf, did not nor would forthwith or at any time afterwards countermand the arrest of the said Plaintiff upon or by virtue of the said writ, but *wrongfully neglected so to do.*" By means whereof the Plaintiff was arrested and kept in prison for several hours, and was put to great charges in procuring his liberty, &c.

Plea. General issue.

The cause was tried before **Heath** J. at the Guildhall Sittings after last *Michaelmas* term, when the suing out the *capias*, the making the affidavit to hold to bail, and the directing the warrant to the sheriff's officers being established, it was proved that on the 8th October the Plaintiff

Plaintiff

Plaintiff went to the house of the Defendant *Fairbain* and paid the debt in question: that on the next morning at 20 minutes past 10 he was arrested at his own house, and carried to that of the officer. Nothing was said, at the time when the money was paid, concerning the writ. The Defendant *Fairbain* lived in *Grafton-Street, Soho*, and there received the money, and in order to countermand the arrest he had only to send from thence to *Titchfield-Street, Oxford-Street*. A countermand was in fact given by letter, though it did not arrive at the sheriff's office until some time in the morning of the 9th of *October*, when all the officers were gone out with their warrants. A question arose at the trial, whether the countermand had been given in reasonable time. The learned Judge ruled this to be a question of law; and that if it were incumbent on the Defendants to countermand the arrest, as supposed by the pleadings, they ought to have done it in the course of the day in which they received the debt. The jury found a verdict for the Plaintiff. Damages 5*l.*

Sellon Serjt. in the course of last term obtained a rule to shew cause why a new trial should not be had, on the ground of a misdirection; but when the case was called on

EYRE Ch. J. said, there could be no doubt of the direction of the learned Judge being perfectly correct, the question of reasonable time being for his decision and not for that of the jury. He suggested however, that as the declaration averred, that the Defendants had *wrongfully neglected* to countermand the writ, a motion might perhaps be supported in arrest of judgment: in which case the question would arise, whether the Defendants had such a duty necessarily imposed upon them to countermand the writ instantly on the satisfaction of the debt as made them guilty of *wrongful neglect*, in case of the Plaintiff suffering any damage by their omission; or whether they had by law a reasonable time to perform that duty which did not appear to have been exceeded?

ROOKE J. was of the same opinion as to the direction of the learned Judge, thinking reasonable time a question of law, not of fact: for this he cited 13 Co. 3. *Bract. lib. 2. fol. 51. (a)* and *Cro. Car. 14.*

(a) The passage in *Bracton* is, rather incorrectly, cited in the margin of *Coke* thus; whereas it only relates to the length of possession necessary to confer a title, and runs thus; "Quam longum debet esse tempus non definitur in iure, sed pendet ex iusticiorum discretionibus;" as if it applied to time in general, "Quam longo (scilicet posseffio) effe debet non definitur à jure, sed ex iusticiorum discretionibus."

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Accordingly the rule for a new trial having been discharged, and a rule *nisi* for arresting the judgment granted,

Shepherd Serjt. now shewed cause. Upon this motion in arrest of judgment, the consideration of reasonable time is out of the question: and whatever tends to shew that the Defendant had no opportunity of countermanding the writ, is evidence to rebut the Plaintiff's allegation of wrongful neglect. Here the question is general, whether a party to whom a debt has been paid, and who does not prevent the execution of a writ, be liable to an action: if the declaration had stated, that the Defendant without sufficient reason caused the sheriff to execute the writ, it would clearly have been good: in which case, evidence that he neglected to countermand the writ, might have amounted to causing the sheriff to execute it; since there can be little difference between causing the sheriff to arrest without reason, and omitting to prevent the arrest when the reason which did exist has ceased. In actions for malicious arrests, the gist of the action is the arrest: neither making the affidavit of debt, suing out the writ, or putting it into the hands of the sheriff will support the action, unless an arrest follow; and whether such arrest be occasioned by the actual malfeasance of the Defendant, or by his nonfeasance in omitting to do the necessary acts to prevent it, makes no difference in principle. *Hobart* in his report of *Waterer v. Freeman*, 267. says, "Likewise I hold that I " may have an action upon the case against him that sues me " against his release or after the money duly paid." Every man is bound to stop the continuation of any act set on foot by himself as soon as it becomes injurious to another.

Sellon Serjt. in support of the rule. This is an action of the first impression, and if not bad upon the general principle, cannot be supported in the way in which it is shaped. 1st, The action is founded on a supposed duty which the Plaintiff ought to have performed; that duty however must arise from a legal obligation; a mere moral obligation will not suffice. The writ having been sued out by the Defendants for a debt actually due, they were not bound to accept the satisfaction tendered; having accepted it and thereby granted an indulgence which the law could not have compelled, it cannot be contended that such indulgence shall impose a new duty upon them. The *dictum* in *Hobart* applies only to the case of a new writ sued out subsequent to satisfaction accepted. Besides it was the business of the Plaintiff to have taken care

care that the writ was countermanded, and no person can maintain an action against another for damage sustained in consequence of his own neglect. *Virtue v. Birde*, 2 Lev. 196. 1 Vent. 310. S. C. 3 Keb. 766. S. C. *Bayly v. Merrel*, Cro. Jac. 386. 1 Roll. Rep. 275. S. C. and in *Paisley v. Freeman*, 3 Term Rep. 51. the same principle is recognized. 2dly, This action cannot be maintained in the way in which it is stated on this record. It can only be supported on the ground of malice, which must be averred in the declaration. *Goslin v. Wilcock*, C. B. 2 Wilf. 302. There should also have been an averment that the writ was not countermanded in reasonable time; for supposing the writ to be sent into the country and the debt to be paid in town, it may be impossible for a Plaintiff to countermand it before execution.

EYRE Ch. J. It is agreed that this is an action of the first impression, and it strikes me at present that it cannot be supported. It is not founded on any injury wilfully committed by the Defendants, but on a mere non-feasance. The writ having been regularly sued out, a tender was made, which it is clear these Defendants might have refused to receive. However they think proper to accept it. Upon this, was it not the business of the Plaintiff to inquire whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to desire a countermand which he might take to the sheriff? The Plaintiff ought not to have trusted to a countermand of the writ by the Defendants, but to have obtained it for himself by his own diligence: it appears that the Plaintiff has been the occasion of all the inconvenience which he has suffered; for, having made it necessary in the first place, by his neglect to pay a just debt, that the writ should be sued out, he did not prevent its consequences by taking the countermand into his own hands. If the cause had proceeded, the offer to satisfy the debt could not have been pleaded as a tender. Without the ingredient of malice this action cannot be supported, and I think, in a case new as this is, and where mal-feasance and non-feasance are attempted to be confounded, the Court ought to incline against it. Had the defendants refused or wilfully neglected to countermand the writ, it might have afforded evidence on an averment of malice by which such an action might have been sustained; but without such averment the Court should be extremely cautious of subjecting a party to damages for mere non-feasance. I am more inclined to remain upon that ground which has been already

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trodden, than to open a new field for litigation, of which it is not easy to see the extent.

BULLER J. Under some of the circumstances stated by my Lord, I think an action might be maintained, though of a different complexion from the present. If any conversation had taken place between the parties at the time when the debt was satisfied, or anything had passed from which an undertaking to countermand might have been inferred, and the costs of the writ had been paid, that might have afforded ground for an *affimp^t*, and payment of the costs would have been a sufficient consideration. But this is an action for mere non-feasance; now in order to support such an action, some duty must be shewn to have attached on the Defendants. Here however the Plaintiff himself seems to have been guilty of great negligence, not having taken a discharge or receipt for his debt, which of itself would have been a sufficient answer to any arrest. The position contended for, is, that where a party in such a case as this receives his debt, the law imposes an obligation on him to countermand the writ. But that countermand may be attended with some expence, and where is the authority to shew that a man who only receives his due is under any obligation to incur expence? The case was well put of a writ sent into the country, and an arrest after a payment in town; for the Court can make no distinction between that which is to be done at the distance of 100 yards, and that which is to be done at the distance of 100 miles. The question is, whether the receipt of the debt imposed any obligation to incur expence?

HEATH J. I am of the same opinion. This action is founded on mere non-feasance, and no case or precedent has been cited to shew that such an action was ever maintained. All the cases of arrests and holding to bail without cause are founded on malice. Had any thing passed in conversation with respect to a countermand of the writ, that might have been evidence of malice. At all events the party was not bound in this case to stop the action until the costs were tendered.

ROOKE J. I am of the same opinion. An action of this kind cannot be supported, unless malice be alleged and proved.

Rule absolute.

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PARKIN v. RADCLIFFE.

April 12th.

THESE parties having gone to trial upon the issues joined according to the intention intimated by them when the cause was before the Court on a former occasion (*a*), the cause came on before Thompson Baron at the Spring Assizes for York, when a verdict was found for the Plaintiff.

Cockell Serjt. now moved for a new trial on two grounds, 1st, A misdirection of the Judge; 2dly, His having rejected evidence which ought to have been admitted. He stated the circumstances at the trial to have been as follow: The Defendant having given parol evidence to shew that heriots had always been taken on alienation, and that several seizures had been made, produced certain entries from the year 1667, to the year 1794; these for the most part were entries of sums affeſſed by the jury of the manor for *heriots* or *fines of heriots* (both terms being used in the Rolls) on alienation; one however dated the 31st May 1667 was in the following form: "Thomas Haigh one old cow " for a fine of a harriott for William Jackman of Halifax upon "alienation 1l." It was not disputed that heriots were due on descent: in order therefore to make these entries support a right to a heriot on alienation, and to explain the term "fine of heriot" therein used, the Defendant offered to prove, that by the custom of the manor, appraisers had always been appointed upon the death of every tenant to appraise his effects; that the jury had then inquired which was the best chattel of the deceased, and declared it to be a heriot due to the lord; after which they had proceeded to set a price upon it, in doing which they had always followed the valuation of the appraisers: and he produced the rolls of the manor relating to descent, in which was the following entry, dated 15th April 1661, among others of a similar nature: "John Marsden's death presented, and that a cow was the best of his goods at his death, and of the value " 11l. que prædict vacca deliberari debet Dmo maner' pro herioto suo." This last evidence was rejected by the learned Judge, who treated all the entries as evidence of mere money payments, and said that the only question to be tried by the jury was, whether a heriot in kind were due? For that the

Evidence that the homage have been accustomed to affeſſ a certain sum of money as a heriot upon alienation, and that such affeſſment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation.

(*a*) *Vid. ante*, 282.

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lord having claimed a specific thing, if not entitled to that must fail in his avowry. (a)

EYRE Ch. J. Had I been in the place of the learned Judge, I am not quite certain that I should have rejected the evidence; but had I received it I should have found myself obliged to turn the application of it against the Defendant. The entries in question tend to shew, that no heriot in kind is due even in the case of descent, but a pecuniary payment only. Whether the jury in estimating the sum to be paid refer to the value of the best chattel, or whether they assess a sum in gross, it is equally clear that the lord receives nothing in specie. The right of the tenant to have a sum assessed in lieu of the chattel is inseparable (b) from the right of the lord: the right of the latter therefore is not an absolute right to the chattel, but to something to be commuted for it by the jury.

Cockell took nothing by his motion.

(a) On a justification by the lord of the manor, under a custom, that the lord should have the best beast on the tenant's death the custom proved was, that the lord should have the best beast or good &c. and the whole Court of C. B. held the variance fatal. *Adderley v. Hart*, T. 4 Geo. 1.

(b) Vid *Gray's case*, 5 Co. 78. b. in which it was held, that where a party prescribes absolutely, and the evidence is of a prescription under a condition or limitation, if such condition or limitation be parcel of the prescription, it is a variance: *sicca* if not parcel.

April 12th.

BRANDON v. BRANDON.

An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made; even though the time and place for payment of the money awarded be specified in the award.

WILLIAMS Serjt. in the course of last term shewed cause against a rule obtained by *Marshall* Serjt. for an attachment for not paying a sum of money pursuant to an award, and contended, that though it was awarded that the party should pay the money at a particular time and place, viz. between the hours of 10 and 12 on a certain day, at the *Baptist-head Coffee-house*, yet that a personal demand and tender of a release, which were necessary, not having been made, the attachment could not issue.

EYRE Ch. J. The reason for naming a particular time and place is, to supersede the necessity of a personal demand, and I know of no authority that in such case any demand need be made.

ROOKE J. This objection would afford no answer to an action on the award, but I think it was held in the time of Mr. Justice *Gould*, that a personal demand must be shewn in applications to the summary jurisdiction of the Court.

It having been also suggested at the bar that such a practice had prevailed, the cause was ordered to stand over till the bench should be full.

On this day the cause was again mentioned, when the Court declared themselves of opinion, that a personal demand was necessary to warrant the issuing of the attachment, but

EYRE Ch. J. said, that though he submitted to the practice, he continued to think that on principle a personal demand was unnecessary.

Rule discharged without costs. (a)

(a) *Vid. 12 Mod. 257. Amon. C. B.* where it is said by the Court, that there must be a positive affidavit of personal notice of award and demand of the money all at one time, because it brings the party into contempt. *Vid. etiam King v. Tolsey, 12 Mod. 312. K. B.*

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Sir HARRY GORING Bart. v. WELLES, Clerk.

April 12th.

THE Defendant having granted several annuities which he was unable to pay, on the 3d of September 1798 entered into an agreement to give up to the Plaintiff and several other annuity creditors 800*l.* in cash, and a bond for 1020*l.* with interest from the 14th December 1798, payable to the Defendant on the 14th June 1799, to be divided amongst them on the 1st July in the same year. The bond was to be placed in a banker's hands as the property of the annuity creditors, they being at liberty to hold the securities for their respective annuities till the time of payment, and signing an undertaking to make void and deliver up the securities at such time of payment. Among these securities was a warrant of attorney to confess judgment given by the Defendant to the Plaintiff, for the purpose of securing an annuity of 100*l.*

A rule having been obtained in the last term, calling on the Plaintiff to shew cause why this warrant of attorney should not be delivered up to be cancelled; 1st, Because at the time when the Defendant executed it he was not aware that it was a security for an annuity; 2dly, Because the consideration for the annuity had never been paid;

Shepherd Serjt. now shewed cause, and urged that as the annuity had been put an end to by the agreement between the Defendant and his creditors, the warrant of attorney now stood as a security

money and delivery of the bond to the creditors, their debt is satisfied whether the bond prove good or bad.

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If several persons who have purchased annuities of A. agree to give up these annuities on receiving a certain sum of money and a bond payable at a future day, they retaining their annuity securities till the bond becomes payable, the Court cannot under the 17 Geo. 3. c. 26. order any of the securities so retained to be delivered up, although they may be void. At least not unless the creditors attempt to set them up again as annuity securities on non-payment of the stipulated sum or the bond's proving bad. *Semb.* That after payment of the

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for the money actually advanced, and consequently could not be affected by the provisions of the annuity act. He added, that a case under the same circumstances had been before the King's Bench on that day, in which the rule was discharged.

Le Blanc Serjt. in support of the rule contended, that in case a dividend should not be made among the creditors on the 1st of July according to the agreement, the warrant of attorney would remain in full force as a security for the annuity, and execution might be taken out upon it: and that being defective within the provisions of the annuity act, the Court ought not to suffer it to continue in the Plaintiff's hands.

EYRE Ch. J. It is one thing, whether the Court ought to set aside these securities, considered as securities for a subsisting annuity, and another, whether it ought to entertain this application, after the annuity has been abandoned and a new agreement entered into for the repayment to the grantee of the principal sum. In the former case the objections now made might have prevailed; but in my apprehension, this motion has been made in breach of good faith, and in contravention of that new agreement between the parties, to insure the performance of which the annuity securities were to remain in the hands of the grantees. It is true that it may be urged as an argument, that the grantee, in case the stipulated payments shall not be duly made on the 1st of July, will attempt to resort to the securities as annuity securities: but should he do so it will then be time to apply to the Court to interfere as in the case of a subsisting annuity. Here the annuity having been abandoned, the motion now before the Court is made for a purpose quite collateral to 17 Geo. 3. c. 26. The construction put upon that act has never been carried to the length of saying that the grantee shall not get back his money.

BULLER J. I think it perfectly clear that the warrant of attorney was objectionable at the time when the annuity was granted: but the question is, whether any thing has since been done to waive the objections? Unquestionably the grantee may waive them if he thinks fit. Here a new agreement has been entered into, by which the annuity was turned into a money debt. This amounted to a waiver of the objections. The argument in support of the rule proceeds on the supposition of a case which never occurred, nor do I think that it ever could occur. It having been settled that the warrant of attorney should remain as a security for the new agreement, it must so remain; nor can it ever be resorted to again to enforce

enforce the annuity. From the moment that the 800*l.* was paid over and the bond delivered into the banker's hands, there was an end of the whole debt, and the creditors were to run the risk of the bond being good or bad. It is true that there can be no use in leaving the warrant of attorney in the hands of the party, but the Court cannot order it to be delivered up.

The Court were inclined to discharge the rule with costs, but finding that the Court of King's Bench had not done so in the case alluded to,

Discharged the rule without costs.

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POULTER v. KILLINGBECK.

April 12th.

6 East, 607.

*I NDEBITATUS assump*fit*.* The first count of the declaration was "for 20*l.* for the moieties of divers crops of wheat and cole-seed, by the Plaintiff before that time sold to the Defendant, and by the Defendant in consequence of such sale before then had reaped and taken to and for his own use and benefit." The 2d count was on a *quantum meruit*, "for that the Plaintiff had permitted and suffered the Defendant to depasture, eat up, and consume with his cattle the moiety of a certain other crop of cole-seed." There was also a count for money had and received.

Plea. General issue.

The cause was tried before *Ashurst*, J. at the last *Cambridge* Spring Assizes, when it appeared that the Plaintiff being possessed of certain pieces of fenn-land which he was desirous of having put into a state of cultivation, made a verbal agreement to let them to the Defendant without rent, who was to plough, dress and sow them for two successive crops, and in lieu of rent to allow the Plaintiff a moiety of the crops. While the crops of the second year were on the ground, an appraisement of them was taken for both parties, and the value ascertained. The Defendant having afterwards refused to pay a moiety of the value, this action was brought. It was contended at the trial, that a special agreement for a moiety of the crops having been proved, this action of *indebitatus assump*fit**, for a moiety of the value, could not be supported: and also that the agreement itself was within the statute of frauds: first, because it related to land; and secondly, because it was not to be executed within a year; and that it ought therefore to have been in writing. A verdict

A. agreed with *B.* to let him land rent-free on condition that *A.* should have a moiety of the crops; while the crop was on the ground it was appraised for both parties; *A.* declared in *indebitatus assump*fit** for a moiety of the value of the crop sold to *B.* without stating the special agreement; and held that he might well do so, as the special agreement was executed by the appraisement and the action arose out of something collateral to it.

Semb. That such an agreement need not be in writing under the statute of frauds.

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was found for the Plaintiff, subject to the opinion of the Court on the first objection.

**POULTER v.
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Accordingly, *Sellon* Serjt. now moved for a rule to shew cause why this verdict should not be set aside and a nonsuit be entered.

EVRE Ch. J. The circumstance of the appraisement seems to put an end to this point. It is true that as the case originally stood the Plaintiff had a claim to a moiety of the produce of the land under a special agreement; but that special agreement was executed by the appraisement. It had been agreed that the moiety of the crops was the property of the Plaintiff; but he being willing that the Defendant should keep them, a surveyor was appointed to settle the price between them. The circumstance of the appraisement affords clear proof that the plaintiff sold what the Defendant had agreed was his: and the price being ascertained, brings this to the case of an action for goods sold and delivered (a). It is unnecessary to state a special agreement, which has been executed, where the action arises out of something collateral to it.

BULLER J. If no appraisement had taken place, the objection to the action in this form must have prevailed. But that circumstance is decisive. With respect to the point made at the trial, on the statute of frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops.

Sellon took nothing by his motion.

(a) An agreement executed often amounts to a bargain and sale. *Cass. Dig. tit. Agreement (A 2). Dig.*

April 17th.

ROBERTS and Others, Assignees of HORSMAN a Bankrupt, v. EDEN.

A note payable on demand with interest drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose; after the indorsement it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it as he should want it when he settled accounts with A.; held that C. could not, after a settlement of accounts between A. and B. without a re-delivery of the note, recover on it against A.

ACTION by the assignees of the indorsee of a promissory note against the drawer: the note was for 400*l.* dated the 20th of April 1792, and made payable to one *Hunt* on demand, with lawful interest, and had been indorsed by him to the bankrupt, *Horsman*.

It appeared at the trial before *Rooke* J. at the Guildhall Sittings in this term, that the note in question was given by the Defendant

ant

ant *Eden* to *Hunt*, (who was a banker,) for money borrowed; that *Hunt* indorsed it over to *Horsman* as a security for money advanced in the course of trade; that in 1793 *Hunt* and *Eden* settled accounts and the balance was paid, but the note in question was not asked for or delivered up; that the note had passed backwards and forwards several times between *Hunt* and *Horsman*, during all which time the former was indebted to the latter in more than 400*l.*; and that *Hunt* upon one occasion (the date of which did not appear, but which was before the last time the note was deposited) told *Horsman* that it must not be negotiated, as he should want it when he settled accounts with *Eden*. For the Defendant it was contended, that as the note had been taken out of *Horsman's* possession, and again placed in his hands so long after it bore date, and with an intimation not to negotiate it, it was taken under such circumstances of suspicion as ought to have induced him to make some inquiry concerning it; and it was compared to a bill of exchange negotiated after it has become due, in which case the holder must stand upon the title of the person from whom he receives it. On the part of the Plaintiff it was insisted, that there was no analogy between a bill payable on a day certain and this note, which being made payable on demand, with lawful interest, was intended as a permanent security; that the intimation given by *Hunt* to *Horsman* not to negotiate the note, as he might want it when he settled accounts with *Eden*, so far from being a circumstance to raise suspicion, amounted to saying that an open account existed between *Hunt* and *Eden*, and that the note had not been paid; that *Eden* ought, under these circumstances, to suffer for his own neglect in not getting the note back when he settled accounts with *Hunt*. The jury found a verdict for the Defendant.

Le Blanc Serjt. now moved for a rule nisi for a new trial, on the part of the Plaintiff, and contended, on the grounds above stated, that the verdict was contrary to law and evidence.

EYRE Ch. J. It is clear that this note was not regularly negotiated from *Hunt* to *Horsman*, so as give the latter an absolute property in it, but only so as to give him a security to the amount of the balance due from the former. Suppose this to have been the case of a bond: it would have been in the nature of a pledge, and good for nothing after the debt had been satisfied. The question then is, whether there be any difference between a bond, and a note circumstanced like the present, which has been placed in

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in the hands of a creditor as a mere security for his debt, except that the latter may be put in suit in the name of the holder, but the former must be sued in the name of the principal? When the note was put into the hands of *Horsman*, he was told that he must not consider it as his own, for that *Hunt* might want it when he settled accounts with the Defendant. I agree with my Brother *Le Blanc*, that this circumstance did not import that the note had been paid at that time, but it is decisive to shew that it was not negotiated to *Horsman*, but only deposited with him as a pledge; the consequence of which is, that it must remain in his hands subject to the same equity as if it were in the hands of the original payee. However, as I understand that the verdict did not pass to the entire satisfaction of the learned Judge who tried the cause, there can be no objection to our granting a rule to shew cause.

BULLER J. There are many situations in which one man is bound to stand in the place of another; and this seems to me to be one of the clearest cases that ever came before the Court. Here is direct evidence that *Hunt* told *Horsman* that he must not negotiate the note, as he should want it when he settled accounts with the Defendant. Did not that amount to saying, "The Defendant has a charge and lien on the note: you must not consider it as cash, but must stand in my situation." It is impossible to understand the words in any other way.

ROOKE J. Though the verdict was not altogether agreeable to my directions to the Jury, I cannot say that I was dissatisfied with it. The case was not considered, at the trial, in the light in which it has been viewed by my Lord and my Brother *Buller*; but I entirely concur in their opinion.

Le Blanc finding the opinion of the Court against him, declined taking a rule to shew cause.

 April 22d.

 3 East, 298.
6 East, 456.

If the grantee of
a market under
letters patent
from the crown,
suffer another to
erect a market

in his neighbourhood and use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. The crown is not.

Quare. Whether if no specific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in such case he can support any action for an injury to his market?

 HOLCROFT v. HEEL.

ACTION on the case; For that whereas the Plaintiff, on the 1st day of March 1798 and before, was and from thence hitherto hath been and still is lawfully possessed of a certain close,

called

called *Market Close* in *Northcott*, otherwise *Southall*, in the county of *Middlesex*, and of a market holden, and to be holden there, in or upon every *Wednesday*, for the buying and selling of horses and all other kinds of cattle, together with toll, stallage and other commodities, to such like market appertaining; whereby great gains, profit and advantages, during all the time aforesaid, until the committing of the grievance hereafter next mentioned, accrued to and were received by the said Plaintiff, to wit, at, &c., yet the Defendant well knowing the premises, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said Plaintiff, and to deprive the said Plaintiff of the profits emoluments and advantages which he might and ought to have had and enjoyed from his said market, whilst the said Plaintiff was so possessed of his said market, to wit, on *Wednesday* the 7th day of *March* 1798, and on divers other *Wednesdays* between that day and the day of suing out the original writ of the said Plaintiff, being days on which the said market of the said Plaintiff ought to be held and was held, at &c. wrongfully and injuriously and without any legal warrant or authority whatsoever, at *Hayes*, in the said county of *Middlesex*, near to *Northcott*, otherwise *Southall* aforesaid, and within three miles of the said place where the said market of the said Plaintiff was so held and ought to be held as aforesaid, levied and erected and caused to be levied and erected a certain other market for the buying and selling of cattle, and then and there wrongfully and injuriously, and without any legal warrant or authority whatsoever, held and kept the said last-mentioned market, whereby divers great quantities of cattle were then and there brought to, and bought and sold at, the said market so levied, erected, held and kept as last aforesaid; which otherwise on those days to the aforesaid market of the said Plaintiff would have been brought to be there sold, and divers butchers and other persons were induced to resort to the said market so levied erected held and kept at *Hayes*, as last aforesaid, and there to buy cattle who would otherwise have resorted to the said market of the said Plaintiff at *Northcott*, otherwise *Southall* aforesaid, and there bought cattle, to the great damage of the said Plaintiff, and to the great nuisance and detriment of the said market of the said Plaintiff, by reason whereof the said Plaintiff was greatly annoyed and disturbed in the exercise and enjoyment of his said market, and lost, and was deprived of divers great sums of money, amounting in the whole to a large sum of money, to wit, the sum of 100*l.* which

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otherwise would have accrued to him, and he would have had and received from the toll, stallage and other commodities to his market appertaining and belonging; to wit, at, &c.

There were nine other counts stating the market at *Southall*, and the injury thereto in different ways.

Plea. Not Guilty.

At the trial before *Eyre Ch. J.* at the *Westminster* fittings, after last Hilary term, it was proved, that the Plaintiff was lessee of this market at *Southall*, the title to which was founded on letters patent of the 10 W. 3., which, after reciting an inquisition by writ of *ad quod damnum*, proceeded thus: *Dedimus et concessimus ac per presentes pro nobis hæredibus et successoribus nostris, damus et concedimus præfato F. M. et hæredibus suis, liberam et licitam potestatem licentiam et autoritatem quod ipse et hæredes sui habeant teneant &c. unum mercatum in vel super quemlibet diem Mercurii in perpetuum, ac etiam duas ferias five nundinas annuatim, &c. unde cum curia pedis pulverizati ac omnibus libertatibus liberis confutudinibus potestatibus custumagiis theoloniiis stallagiis piccagiis et aliis commoditatibus ad hujusmodi mercatum ferias five nundinas et curiam pedis pulverizati pertinentibus seu spectantibus*; that the Defendant was lessee of certain pens erected in the year 1775 at *Hayes*, within two miles of *Southall*, in consequence of a quarrel between the salesmen and the proprietor of *Southall* market; and that cattle had been sold in those pens on every *Wednesday* since that time. Two objections were taken to the Plaintiff's recovery; 1st, That as no specific toll was mentioned in the letters patent, the Plaintiff was entitled to no toll, and therefore had sustained no injury; 2dly, that after an undisturbed possession of this market at *Hayes*, by the Defendant for twenty-three years, the present action could not be maintained. The Lord Chief Justice nonsuited the Plaintiff, giving him leave to move to set that nonsuit aside, and if the Court should think he ought to have recovered, then a verdict to be entered for him with 1s. damages.

Accordingly, *Le Blanc Serjt.* early in this term moved for a rule *nisi* for that purpose, and urged, 1st, that it was not necessary in a grant of toll to specify the particular sums to be paid, *Palm. 86. (a)*; that by the words of the letters patent such toll having

(a) This was the opinion of three Justices (see also the *Register*, p. 103.); but *Mansfield Ch. J.* held the contrary, and in *Palm. 79.* said that it was agreed by *Paperts* in *Heddy's case* (see *Heddy v. Wheathampstead, Cro. Eliz. 558. and 591.*) that the King ought

having been granted as was usually taken at markets of this kind, the Plaintiff was entitled to take reasonable toll, and that if he exacted unreasonable toll he did it at the peril of forfeiting his market (a). 2dly, Supposing the Plaintiff not entitled to toll, yet that as he had an undoubted right to the market at *Southall*, the levying another market within two miles interfered with that right, and was an injury for which an action might be maintained, as in the case of a commoner who may maintain an action for injury to his common, though he have no cattle to put in (b). 3dly, That the only ground on which the Defendant's possession of the market for more than twenty years could defeat the Plaintiff's right of action, was the presumption which it afforded of a grant; but that all such presumption had been rebutted in this case by the proof which was given at the trial of the commencement of the Defendant's market.

The Court inclined against the Plaintiff's application, but granted a rule to shew cause.

On this day the case was to have been argued by *Le Blanc* and *Shepherd* Serjts. for the Plaintiff; and *Cockell*, *Runnington*, and *Sellon*, Serjts. for the Defendant.

But *EYRE* Ch. J. intimating a decided opinion, that the undisturbed possession of the market by the Defendant for twenty-three years was a clear bar to the Plaintiff's right of action, the counsel for the Plaintiff declined arguing the case.

Per Curiam,

Rule discharged. (c)

ought to determine the quantum of toll. *Moore* 474. S. C. In *O'Bufon v. James* and others, 2 *Lutw.* 1377. where the same words were used in the grant as in the present case, the same objection was taken, but judgment was given on another point. A grant of such toll to be taken at two bridges, as is used to be taken, *ibi et alibi infra regnum Angliae* was held uncertain and void in *Lightsfoot v. Lenet*, *Cro. Jac.* 426.

(a) *Contra Com. Dig.* tit. Market (I); only the Toll is forfeited.

(b) *Vid. Wells v. Walling*, 2 *Bl.* 1233.

(c) In *Campbell v. Witsen*, 3 *Fest.* 298. *Le Blanc* J. laid that the ground on which this case went off, was that on a new trial the Judge would direct the jury to presume a grant after 20 years undisturbed possession.

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April 22d.

BUSH v. STEINMAN.

*15 East, 389.
2 Taun. 317.*

Idem et Ux. v. Eundem.

A. having a house by the road side, contracted with *B.* to repair it for a stipulated sum; *B.* contracted with *C.* to do the work; and *C.* with *D.* to furnish the materials. The servant of *D.* brought a quantity of lime to the house and placed it in the road, by which the Plaintiff's carriage was overturned. Held that *A.* was answerable for the damage sustained.

Pofb, 475.

THESE were two actions on the case against the Defendant for causing a quantity of lime to be placed on the high road, by means of which the Plaintiff and his wife were overturned and much hurt, and the chaise in which they then were was considerably damaged. Pleas. Not guilty.

The two actions came on together to be tried before *Eyre Ch. J.* at the Guildhall Sittings after last *Hilary* term, when the following circumstances appeared in evidence. The Defendant having purchased a house by the road side, (but which he had never occupied,) contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was laid in the road. The Lord Chief Justice was of opinion that the Defendant was not answerable for the injury sustained by the Plaintiff under the above circumstances; but in order to save expence, a verdict was taken for the Plaintiff for 12*l.* 12*s.* with liberty to the Defendant to move to have a nonsuit entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Cockell and Shepherd Serjts. now shewed cause. The question is not whether this action might not have been brought against some other person, but whether it cannot be maintained against the present Defendant. It is sufficiently established that masters are civilly answerable for the neglect of their servants, though absent at the time of the injury committed. *Hern v. Nicholls, 1 Salk. 289.* *Jones v. Hart, 2 Salk. 441.* So it is with carriers and owners of ships. The house in this case was undergoing repair for the Defendant, and the act which caused the injury complained of, was an act done for his benefit, and in consequence of his having authorised others to work for him. Though the person by whose neglect the accident happened was the immediate servant of another, yet for the benefit of the public he must be considered as the servant of this

this Defendant. The maxim in law is *respondeat superior*; and accordingly Lord Kenyon in a case strongly analogous to the present, said, "In all these cases I have ever understood that the action must either be brought against the hand committing the injury or against the owner for whom the act was done." *Stone and another v. Cartwright*, 6 Term Rep. 411. If this Defendant be not liable, the Plaintiff may be obliged to sue all the parties who have subcontracts in this case, before he can obtain any redress for the injury he has sustained.

Le Blanc and Marshall Serjts. contra. The Plaintiff contends, first, that a person is liable for the consequences of every act done for his benefit; at least if the act take place on his own premises: secondly, that he is answerable for any injuries committed by those whom he employs, if the injuries happen in the course of carrying into execution the commission with which they are charged. First, it is clear that the cause of action did not in this case arise on the Defendant's premises, the complaint being, that a quantity of lime which should have been placed there, was actually laid in the high-road: that being the case, there is no authority to shew that the Defendant is liable, merely because the act from which the injury arose was done for his benefit. If that general proposition were true, it might be contended, that the Defendant must have answered for any accident which might have happened during the preparation of the lime in the lime-burner's yard. Secondly, The liability of the principal to answer for his agents, is founded in the superintendence and control which he is supposed to have over them. 1 *Black. Com.* 431. In the civil law that liability was confined to the person standing in the relation of *pater-familias* to the person doing the injury. *Inst. lib. 4. tit. 5. § 1. Dig. lib. 9. tit. 3.* And though in our law it has been extended to cases where the agent is not a mere domestic, yet the principle continues the same. Now clearly it was not in the power of this Defendant to control the agent by whom the injury to this Plaintiff was effected. He was not employed by the Defendant but by the lime-burner: nor was it in the Defendant's power to prevent him, or any one of the intermediate subcontracting parties, from executing the respective parts of that business which each had undertaken to perform. The Defendant's interference would have amounted to a breach of his own contract with the surveyor, by which the latter was empowered to employ such persons as he might

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think proper. So little connection was there between the Defendant and the various persons employed in the work that he could have maintained no action against any one of them for having ill performed his part, but must have resorted to the surveyor with whom his contract was made. With respect to *Stone v. Cartwright*, the owner of the mine was there said to be answerable for the negligence of the persons employed by the steward, but it is to be observed, that he was also answerable to them for their wages. In *Lane v. Sir Robert Cotton*, 12 Mod. 488, 9. Holt Ch. J. said, that "the reason why a principal shall answer for his deputy is, because as he, as principal, has power to put him in, so he has power to put him out without shewing any cause." So in *Michael v. Alestree*, 2 Lev. 172. it was held that an action might be maintained against a master for damage done by his servant to the Plaintiff, in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. But if a servant who is ordered to do a lawful act exceed his authority, and thereby commit an injury, the master is not liable. *Kingston v. Booth*, Skin. 228. *Middleton v. Fowler*, 1 Salk. 282.

EVRE Ch. J. At the trial I entertained great doubts with respect to the Defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the injury sustained by the Plaintiff seemed to render a circuitus of action necessary. Upon the Plaintiff's recovery, the Defendant would be entitled to an action against the surveyor, the surveyor and each of the subcontracting parties in succession to actions against the persons with whom they immediately contracted, and last of all the lime-burner would be entitled to the common action against his own servant. I hesitated therefore in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject, till I had heard the argument on the part of the Plaintiff, and had an opportunity of conferring with my Brothers. They, including Mr. Justice Buller, are satisfied that the action will lie, and upon reflection, I am disposed to concur with them: though I am ready to confess that I find great difficulty in stating with accuracy the ground on which it is to be supported. The relation between master and servant

vant as commonly exemplified in actions brought against the master is not sufficient: and the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be large and loose. The principle of *Stone v. Cartwright*, with the decision of which I am well satisfied, is certainly applicable to this case: but that of *Littledale v. Lord Lonsdale* (^a) comes much nearer. Lord *Lonsdale's* colliery was worked in such a manner by his agents and servants (or possibly by his contractors, which would have made no difference) that an injury was done to the Plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his work in the colliery: whether he worked it by agents, by servants, by contractors, still it was his work: and though another person might have contracted with him for the management of the sole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *sic utere tuo ut enum non ledas*. Lord *Lonsdale* having empowered the contractor to appoint such persons under him as he should think fit, persons appointed would in contemplation of law have been agents and servants of Lord *Lonsdale*. Nor can I think that it could have made any difference, if the injury complained of had arisen from his Lordship's coals having been placed by the workmen, on the premises of Mr. *Littledale*, since it would have been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on either by the express direction of Lord *Lonsdale*, or under a presumed authority from him. The principle of this case therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from *Blackstone's Commentaries* if one of a family "layeth or casteth" a thing out of the house which constitutes a nuisance the owner is chargeable. Suppose then that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a building in the street (which being for the benefit of the public they lawfully do) and they carry it out so far as to encroach

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^a 2 H. Bl. 267, 299. The facts of that case are to be collected from the pleadings.

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unreasonably on the highway, it is clear that the owner would be guilty of a nuisance: and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for in contemplation of law the erection of the hord would equally be his act. If that be established we come one step nearer to this case. Here the Defendant by a contractor, and by agents under him, was repairing his house: the repairs were done at his expence, and the repairing was his act. If then the injury complained of by the Plaintiff was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hord, or from *Littledale v. Lord Longdale*, unless indeed a distinction could be maintained (which however I do not think possible) on the ground of the lime not having been delivered *on* the Defendant's premises, but only at a place close to them, with a view to being carried on to the premises and consumed there. My Brother *Buller* recollects a case which he would have stated more particularly, had he been able to attend. It was this: a master having employed his servant to do some act, the servant out of idleness employed another to do it, and that person in carrying into execution the orders which had been given to the servant committed an injury to the Plaintiff, for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient, and beneficial to the public. Where a civil injury of the kind now complained of has been sustained the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from a circuitus of action. Upon the whole case therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my Brothers.

HEATH J. I found my opinion on this single point, viz. That all the subcontracting parties were in the employ of the Defendant. It has been strongly argued that the Defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of

of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant: but being employed and trusted by the merchant, the latter according to the case in *Salkeld* is responsible for his acts. There are besides this other cases. As where a person hires a coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant. We all remember an action for defamation brought against *Tattersall* who was the proprietor of a newspaper, with sixteen others: the libel was inserted by the persons whom the proprietors had employed by contract to collect news, and compose the paper, yet the Defendant was held liable. Now this is a strong case to shew that it makes no difference whether the persons employed by the Defendant, were employed on a *quantum meruit*, or were to be paid a stipulated sum. In *Rosewell v. Prior*, *Salk. 460.* an action for the continuance of a nuisance was held to lie against the Defendant though he had underlet the building which was the subject of it, and though the Plaintiff had recovered against him in a former action for the erection of the nuisance; for the Court said "he affirmed the continuance by his demise, and received rent as a consideration for it." That case is analogous to the present; the ground of the decision having been, that the Defendant was benefited by the nuisance complained of. It is not possible to conceive a case in which more mischief might arise than in the present, if the various subcontracts should be held sufficient to defeat the Plaintiff of his action. Probably he would not be able to trace them all, since none of the parties could give him any information, and consequently he might be turned round every time he came to trial.

ROOKE J. I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. According to the principle of the case in *2 Lev.* it shall be intended by the Court, that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. The case which has been supposed of the lime having been deposited at a distance from the Defendant's house, and the accident having happened there

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there does not apply: for here a person acting under the general employment of the Defendant brought a quantity of lime to the premises, and deposited it without any objection being made by any person there, whereas it was the duty of the Defendant to have provided a person to superintend those employed in his work. The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise. There is such a variety of subcontracts in this case, as rarely occurs, but this serves only to illustrate more strongly the mischief which would ensue should we depart from the doctrine in *Stone v. Cartwright*. In that case, and in *Littledale v. Lord Longdale*, the safest rule was adopted. The Plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed. If the employer suffer by the acts of those with whom he has contracted he must seek his remedy against them.

Rule discharged.

April 27th.

GWILLIM v. THOMAS HOLBROOK.

The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court, but the plaint if removed by *re-fa. lo.* into a superior court must be prosecuted there with effect, and a return made if adjudged there.

DEBT on a replevin bond by the affinee of the sheriff of *Middlesex*. The declaration stated the Plaintiff's having dis-trained as bailiff of the mayor and commonalty and citizens of the city of *London* governors of the house of the poor commonly called *Saint Bartholomew's Hospital* near *West-Smithfield London* of the foundation of King *Henry the Eighth*, and proceeding in the usual way, set out the bond and condition which was that *R. Holbrook* should "appear at the next county court for the county of *Middlesex* to be holden at &c. and then and there prosecute his action with effect against the Plaintiff for taking and unjustly detaining his cattle &c. and make return thereof if return thereof should be adjudged by law"; it then averred, that a plaint was duly levied at the next county court by *R. Holbrook*, and removed into this court by *recordari facias longelam*; that *R. Holbrook* made default and judgment was given for a return; that the bond was thereby forfeited and was in consequence duly affigned &c.

Plea. *Actionem non*, "because he says, that the said *R. Holbrook* did appear at the county court for the said county of *Middlesex*

Defex holden next after the making of the said writing obligatory as in the said declaration is mentioned, and did then and there prosecute his action with effect against the Plaintiff for taking and unjustly detaining his said cattle goods and chattels, and continued to prosecute the same with effect until the record of the said plaint in the said declaration mentioned was duly had and removed into the said Court of our said lord the King of the bench aforesaid by virtue of the said writ of our said lord the King of *recordari facias loquelas* in the said declaration also mentioned to wit at &c. And this &c. Wherefore &c.

General demurrer, and joinder.

Le Blanc Serjt. in support of the demurrer, contended that by the condition of the bond *R. Holbrook* was not merely bound to prosecute his suit with effect in the county court, but to follow it into the court above, and, to make a return, wherever such return should be legally adjudged: he cited *Anon. Forte. 209. Nichols v. Newman, Forte. 361. and Vaughan v. Norris, Caf. temp. Hardw. 137.*

Shepherd Serjt. who was to have argued on the other side, admitted that the present case could not be distinguished from those cited;

And the Court were of the same opinion.

Judgment for the Plaintiff.(a)

(a) Vid. etiam *Chapman et al. v. Butcher, Cartb. 248. Lane v. Foulk, Comb. 228.*

TIPPET and Others v. MAY and Two Others.

April 30th.

DECLARATION in *affiumpit* against three. Two of the Defendants pleaded a debt of record by way of set-off, without taking any notice of the third. The Plaintiffs replied *nul tiel record*, and gave a day to produce the record to the two Defendants who pleaded, but entered no suggestion on the roll respecting the third.

To this there was a general demurrer; and joinder.

Marshall Serjt. in support of the demurrer. The ground of this demurrer is, that as two of the three Defendants have pleaded, and the Plaintiffs have given them a day to produce the record, without suggesting any thing with respect to the third, the action is discontinued as to him, and that a discontinuance as to one

Affiumpit against three: two pleaded a debt of record by way of set-off: the Plaintiff replied nul tiel record, and gave a day to the two Defendants, but entered no suggestion respecting the third; held on demurrer that the action being discontinued, judgment must be given against the Plaintiff, even though the Defendants' plea were bad.

Defendant

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Defendant is a discontinuance as to all. It is a settled rule of law that a suit must be continued from its commencement to its conclusion without any chasm; and that any chasm is a discontinuance. In *Gibb. Hist. C. P.* 150. 153. it is said that if a Defendant pleads to part and says nothing to the other part, and the Plaintiff replies to such plea without taking judgment for the part not answered to, it is a discontinuance, because he does not follow his entire demand in the court. So if he demur generally, for he ought to have prayed judgment upon *nil dicit* for that part. 1 *Rol. Abr.* fo. 487. 488. And this rule applies not only to the subject-matter of the cause, but also to the parties. 1 *Rol. Abr.* fo. 488. *Com. Dig. Pleader* (W.3). Thus in *Bro. Abr. Discontinuance de Proces, pl. 22.* Replevin against three, avowry by one, and so to issue, and the two others said they came in aid of the avowant, yet if the two have not a day given and continuance on the roll from day to day, all is discontinued: and *pl. 8.* Replevin against three of a taking in *S.* one appeared and avowed for himself in *B.* and traversed the taking in *S.* and made avowry to have a return which passed for the Plaintiff, and he prayed judgment, and it was determined that as no proceeding was against the other two, all was discontinued, for the proceeding shall be made to continue against those who make default, otherwise it is a discontinuance. *Green v. Charnock and another, Cro. Eliz.* 762. is to the same effect. The rule holds also where a Plaintiff makes default. *Paxton v. Lushier, Yelv.* 155. If it be contended on the other side that a plea of set-off by two Defendants in an action against three is bad, still the Plaintiffs will not be entitled to judgment on this record for by the discontinuance the cause is out of court.

Shepherd Serjt. contra. Though the question immediately in issue on this demurrer be, whether the replication which the Plaintiffs have put in be sufficient in law to answer the Defendant's plea, still if we can shew that the plea itself is bad, they cannot have judgment. Indeed if we were to amend our replication the Defendants would be under the same difficulty. No authority has been adduced to shew that discontinuance is the subject of demurrer. (a)

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(a) See *Weeks v. Peach*, 1 *Salk.* 179. and *Market v. Johnson*, 1 *Salk.* 180. in the former of which cases Lord Ch. J. Holt said "if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance and the Plaintiff must not demur but take his judgment for that as by *nil dicit*; for if he demurs or pleads over the whole action is discontinued." However, the doctrine in *Craig v. Bilson*, 1 *Salk.* 3. ref. 2. seems scarcely reconcileable with those cases: there the Defendant

EYRE Ch. J. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the first fault he has a right to take advantage of it on demurrer. But he cannot ask the judgment of the Court unless he appear on the record to be capable of demanding judgment. (a) Now in this case the Plaintiffs, having replied to a plea by two of the Defendants without taking notice of the third against whom they declared, have made a discontinuance; the cause therefore being discontinued, judgment must be given against the Plaintiffs, for they are not in a situation to take advantage of the badness of the Defendants' plea.

ROOKE J. The Plaintiffs not being in court, cannot call upon the Court to give them judgment.

Per Curiam,

Leave given to amend on payment of costs. (b)

Defendant having discontinued by concluding his demurrer to the Plaintiff's replication with a prayer *quod narratio predicta casseretur*, it was held that the Plaintiff had his election to take judgment, or to join in demurrer, and that having done the latter, the Court might give him judgment upon the whole record.

(a) So "When Plaintiff makes replication, sur-rejoinder, &c. and thereby it appeareth that upon the whole matter, and record, the Plaintiff hath no cause of action, he shall never have judgment, although that the bar or rejoinder be insufficient in matter; for the Court ought to judge upon the whole record." Doctor Bowes's case, 8 Co. 120. b. See also in confirmation of this, Ridgway's case, 3 Co. 52. b. and Turner's case, 8 Co. 133. b.

(b) Had the demurrer been of the same term with the record, it seems the Plaintiff would have been entitled *de jure* to enter a

suggestion after demurrer joined. Thus in *Woodward v. Robinson*, 1 Str. 302. where the Defendant having pleaded a bad plea to the 1st count, and in his 2d plea pleaded to part only of the other counts, the Plaintiff in his replication merely tendered issue, and the Defendant demurred; the Court held that though there was a discontinuance, yet the pleading being of the same term, the Plaintiff might still take judgment by *nihil dictum* for so much as was uncovered by the plea. Accordingly the cause was adjourned, and the Plaintiff having set the matter right, had judgment on the demurrer. To the same effect is *Vincent v. Bofon*, 1 Ld. Raym. 716. But it is to be observed, that in those cases the Plaintiffs were not allowed to have judgment until the discontinuances were done away, although the Defendants had committed the first fault upon the record. *Vid. also Middleton v. Cofzman*, 7 Eliz. 65.

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GRIFFITHS v. EYLES.

April 30th.

11 East, 409.

To debt for an escape Defendant pleaded a negligent escape

THIS was an action of debt for an escape out of execution, against the Defendant as warden of the Fleet. Pleas. 1st,

and voluntary return since which the prisoner had been safely kept. Plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought. Defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, voluntary return, and safe keeping since, in the same manner as in the plea. This latter part of the rejoinder the Court refused to strike out on motion, but held it bad on special demurrer.

A plea that, if the prisoner escaped several times (without specifying them), he returned as often, is bad.

Nil

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Nil debet. 2d; That the escape was without the knowledge privity consent or permission of the Defendant, and against his will, and that before he knew of the escape, and before the filing of the bill the prisoner voluntarily and of his own accord returned back into the custody of the Defendant, and continually from thenceforth hitherto hath been and still is there kept and detained in execution at the suit of the said Plaintiff. This was accompanied by an affidavit on the part of the Defendant according to the provisions of 8 & 9 Will. 3. c. 27. s. 6. that the escape was without his privity. The Plaintiff in his replication, 1st, joined issue on *nil debet*; 2dly, admitting that the escape was without the privity of the Defendant and that the return to prison was voluntary, went on to allege that the prisoner had not from thenceforth been kept and detained in the custody of the Defendant, but that after he had so returned into custody and after the Defendant had notice of the former escape, and before the exhibiting the bill, the Defendant permitted and suffered the prisoner to escape and go at large in manner as the Plaintiff had complained against him, "which said last-mentioned escape is another and different escape than the escape mentioned in the plea of the Defendant so by him lastly above pleaded in bar as aforesaid, and was and is the very same identical escape for which the said Plaintiff brought this action and exhibited his aforesaid bill, and this," &c.

The Defendant in his rejoinder having traversed the allegation that the prisoner had not been safely kept since his voluntary return, with a verification in the usual way, proceeded: "And as to the said supposed escape so by the said Plaintiff newly assigned *actionem non*, because if any such escape so newly assigned was made by the said prisoner the same was so made by the said prisoner privately and without the knowledge privity consent or permission of the Defendant and against his will, and that afterwards and before the Defendant knew of such escape and before the filing the bill of him the said Plaintiff against the said Defendant in this behalf, to wit, on &c. at &c., the said prisoner voluntarily and of his own accord returned back again into the custody of the said Defendant, and continually from thenceforth hitherto hath been and still is kept and detained in the custody of the said Defendant in execution at the suit of the said Plaintiff for the debt and damages aforesaid in form aforesaid recovered by the said Plaintiff; which said escape in this plea mentioned, if any such was made, is the same escape whereof

" whereof the said Plaintiff hath above in his said new assignment
 " in this behalf alleged against him the said Defendant. And
 " this &c. wherefore he prays judgment if the said Plaintiff
 " ought to have or maintain his aforesaid action in respect of
 " the premises so newly assigned against him," &c.

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Le Blanc Serjt. in the last term moved to strike out the latter part of the rejoinder, contending that the Defendant had pleaded two rejoinders, which he could not do even with the leave of the Court, much less without it: and that it was like the case of a Defendant pleading two pleas without the leave of the Court, where the Plaintiff may apply to the Court to strike out one of them. (a)

Shepherd Serjt. opposed the application in the first instance, and urged that as the replication was in the nature of a new assignment, the Defendant was obliged to put in this sort of rejoinder in order to meet the allegation of a voluntary escape in the latter part of the replication.

Eyre Ch. J. There is a difference between this case, and that of two pleas pleaded without leave of the Court: the two pleas are distinct from each other; this is but one rejoinder containing double matter; it may be a subject for demurrer, but not for the exercise of the summary jurisdiction of the Court.

In consequence of this intimation from the Court a special demurrer was afterwards put in, assigning for causes, " that the said rejoinder is double and multifarious in this, that it contains two separate and distinct answers, and offers two separate and distinct issues upon the aforesaid replication of the Plaintiff to the said plea of the Defendant, so by him lastly above pleaded in bar, whereas only one issue could or ought to have been offered or taken upon the said replication or upon the matter therein contained, and that the said rejoinder is also double and informal in this, that it offers to put in issue two distinct and different escapes, whereas the Plaintiff hath originally declared upon and in his subsequent replication hath supported his said declaration by only one escape, and that according to the rules of good pleading the said rejoinder should and ought to have been confined to and

(a) It has been said that in such case *ford v. Gatfield*, H. 26 G. 3. K. B. the double plea is a nullity, and the Plaintiff may give judgment, *per Butler J. Bed-* *Tidd's Pr. 388.—I. Selton's Pr. 296.*

" have

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" have concluded with a traverse, which is thereby taken on the " said escape so set forth in the said replication of the said Plaintiff, yet the said Defendant hath very unnecessarily and inadvertently extended the said rejoinder to further and other and different matter by way of supposed second answer to the said replication, whereas only one answer could or ought to have been made to and only one issue offered or taken upon the said replication or in or by the said rejoinder; and that the matter so secondly alleged in the said rejoinder is no answer to the said replication, nor direct or positive denial of the escape therein mentioned, but only an argumentative denial of such escape, whereas the said escape should have been expressly and directly traversed and denied by the said rejoinder; and that the said rejoinder is calculated to occasion the trial of two separate issues upon one and the same fact, and also to introduce a vexatious and unnecessary length of pleading in this cause; and that the said rejoinder is repugnant and informal in this, that although in one part thereof it confiders the said replication and answers the same as being a replication, yet in another part thereof it confiders the said replication as being a new assignment, and professes to answer the same accordingly, and that the said rejoinder is in various other respects repugnant, multifarious, insufficient and informal."

Joinder in demurrer.

Le Blanc in support of the demurrer now contended, that if this rejoinder should be allowed the pleadings might go on *in infinitum*, for if the Plaintiff were to fur-rejoin in the same manner as he had replied, the Defendant might rebut in the same manner as he had rejoined, and so a new issue would be created at every stage of the pleadings; and that it was a clear rule in pleading that issues could not be multiplied after the plea.

Shepherd Serjt. contra, again insisted that as the Defendant could not give in evidence a negligent escape and voluntary return in answer to the allegation of a voluntary escape in the latter part of the replication without putting it on the record, the Defendant might be deprived of a fair defence, unless the rejoinder were allowed; and urged that the form of the rejoinder was the consequence of the unusual and ingenious way of pleading adopted in the Plaintiff's replication.

EYRE Ch. J. If the observation be well-founded, that the common forms of replication in these cases stop at the allegation, that

the warden has not kept the prisoner in custody since the first voluntary return, the consequence is, that this replication is not merely ingenious but informal, and my doubt has been, whether the first fault was not committed by the Plaintiff. But in truth it seems to me that the latter part of the replication is nothing more than an amplification of the denial that the Defendant had kept the prisoner in safe custody; it amounts to this, that he had not kept him in safe custody, for he had permitted him to escape afterwards. It does not appear to me that this rejoinder will enable the Defendant to give in evidence any second voluntary return. The Defendant by his plea excuses an escape, upon the ground of the prisoner having voluntarily returned and remained in his custody ever since. Now put the case that the prisoner had made two or three escapes, and had returned as many times, the Defendant was bound to state them all in his plea, in order to establish the averment that the prisoner had been kept in safe custody ever since. If this be not the case, the pleadings may go on for ever. The Defendant therefore has made the real fault, as there is nothing in the replication in the nature of a new assignment. Perhaps had the Plaintiff merely traversed the allegation in the Defendant's plea, it would have been sufficient and the shortest way, though I do not think him wrong for putting in a more explicit contradiction.

The Court however gave the Defendant leave to amend on payment of costs, intimating at the same time that it must be done in such a way as not preclude the question being brought to issue as soon as possible.

Accordingly the Defendant amended his second plea by inserting an allegation "that if the said prisoner did at any time or times after the said commitment &c. go at large from and out of the said prison of the Fleet and from and out of the custody of him the said Defendant, he the said prisoner so escaped and went at large privately and without the knowledge &c. of him the Defendant and against his will; and that if any such escape or escapes was or were so made the said prisoner after such escape or escapes and before the Defendant knew of such escape or escapes and before the filing of the bill voluntarily and of his own accord returned back again into the custody of the Defendant and continually from thenceforth until and at the time of the commencement of the suit was and hath been and still is kept and detained," &c.

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Upon this *Le Blanc* again applied to the Court and contended, that this plea by no means complied with their injunction, and was so framed as to afford no probability of any issue.

EYRE Ch. J. The defendant knows and is bound to know the state of his prison, and whether there has been an involuntary escape and a subsequent return and safe keeping of the prisoner since that time, or whether there has been no escape at all. If there has been one escape and one return, or if there have been ten escapes and ten returns, and the Defendant thinks fit to plead them, and to insist, that independent of such escapes the prisoner has been kept in safe custody, he is at liberty to do so. But he cannot plead hypothetically that if there has been any escape there has also been a return. He must either stand upon an averment that there has been no escape or that there have been one, two, or ten escapes, after which the prisoner returned, and that having kept him in custody since that time he is entitled to give that answer to the Plaintiff's charge. The Defendant must take upon himself to state the escapes specifically, that the Plaintiff may have an opportunity of combating his assertion. With respect to the Plaintiff's replication it never abandoned the escape laid in the declaration. To that escape the Defendant pleaded what was an answer as far as it went; in reply to which the Plaintiff admitted the fact of the Defendant's plea, but added, that he did not complain of the escape previous to the return, but that the Defendant had not kept the prisoner in custody since that return.

The Court again gave the Defendant leave to amend, by striking out the latter part of the rejoinder which had been demurred to, and leaving the traverse of the allegation, that after the return of the prisoner, and after notice of the former escape, the Defendant voluntarily permitted the prisoner to escape. (a)

(a) The Defendant having amended accordingly, issue was joined on the traverse, and the cause came on to be tried before Eyré Ch. J. at the Guildhall fittings after this term. At the trial the Plaintiff proved a notice of an escape to the Defendant, and an escape subsequent to that notice, but did not prove any escape previous to the

notice. Upon this the Lord Chief Justice nonsuited him, holding, that the first escape must still remain the *gist* of the action, and would be purged or not, as it should turn out that the prisoner had or had not been safely kept since his voluntary return after that escape.

1799.

PEEL and Others v. TATLOCK.

April 30th.
12 Enq. 227.
2 H. Bl. 613.
2 Camp. N. Pri.
415. 437.

THIS action was brought to recover 100*l.* the amount of the Defendant's subscription to a guaranty of 600*l.* for the true and faithful discharge of the trust which the Plaintiffs might repose in one *Abelom Goodrich*, acting as cashier or superintending clerk in their banking-house.

The cause was tried at the Guildhall sittings after last *Michaelmas* term, before *Heath J.* and a Special Jury, when the following facts appeared in evidence. The guaranty was signed on the 5th October 1790: *Goodrich* continued in the Plaintiffs' service till March 1793, at which time he absconded having embezzled money of the Plaintiffs to the amount of 1292*l.* 8*s.* 6*d.* In April following a correspondence commenced between *Goodrich* and the Plaintiffs, in which the former, after stating that he had embezzled four bills, went on thus; "I should conceive it may not be unreasonable to propose that the gentlemen should make a consideration of about 300*l.* for the extra exertions I have used for the interest of the house, and the extra expences I have been at by having no regular home in town: perhaps there may be due to me on my own account about 100*l.* though of this I am not quite certain. If these proposals could be admitted, I should then stand a debtor to the house about 890*l.* My property at home may have cost me about 150*l.* which I freely offer." He then suggested a plan (*a*) for balancing the books of the house, by which the Plaintiffs might keep his misconduct secret from the other clerks, and having intimated an intention of retiring into the country and establishing a school, concluded thus, "Whatever I can obtain by labour and industry above the common necessaries for existence shall be faithfully appropriated to repay the debt once a month or once a quarter into the hands of some person for your use." In answer to the above the Plaintiff wrote a letter dated the 22d June 1793, containing the following expressions; "We have no objection to your adopting your proposed plan of tuition, and you may rest free of apprehension from being disturbed in a laudable pursuit for support of yourself and

If *A.* become bound to *B.* for the honesty of *C.* who embezzles money, *B.* may maintain an action on the guaranty, though three years have elapsed without any notice having been given of the embezzlement of *C.* by *B.* to *A.*; at least if *A.* was acquainted with the circumstance from any other quarter, and *B.* does not appear to have concealed it from him industriously. *A.* will not be discharged from his guaranty though *B.* appear to have given credit to *C.* for the amount of the sum embezzled.

(*a*) This was to be done by entering the deficiency as a loan to him in the private ledger of the partners, and carrying it into the books to which the clerks had access, under the head of private loan, marked with a particular letter.

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" family, taking it for granted that your representations to us will be found strictly true. Indeed by such endeavours it is possible that you in future may be in a situation to make some recompence for past misfortunes, and respecting which in every conversation which we have been obliged to enter into we have uniformly expressed ourselves with great tenderness towards you. If we had no other motives for that, self-policy would dictate such conduct." The plan suggested by *Goodrich* for concealing his misconduct from the clerks was adopted by the Plaintiffs. In the Summer of 1795 *James Tatlock* offered *Goodrich*, who was then out of employ, to procure him a place provided the Plaintiffs would give him a character: upon which *Goodrich* made an application to the Plaintiffs for that purpose, and on the 15th September 1795 wrote them a letter in which were the following expressions: "I have just waited on Mr. *Tatlock*, and mentioned in general what you remarked on my request, his reply was, he would call on you himself this day; it would have pleased me better had not that been the case; but as I could not with any propriety forbid him, I must take the consequences. However as I believe Mr. *Tatlock* knows no more of my concerns in your house than what I have told him myself respecting *Riley*, *Barber &c.*'s (a) losses, you will have it in your power to speak in general terms respecting your being considerable losers by my imprudence, and this done with tenderness on your part may induce him to be my friend. In regard to the bond, should he mention it, and you think proper, perhaps making him the offer of his name may be in my favour." No evidence was given of actual notice by the Plaintiffs to the Defendant or to any of the other subscribers to the guaranty of *Goodrich*'s misconduct, and the loss they sustained thereby, till July 1796, when actions were commenced against the Defendant, and against his brother *James Tatlock* and one *S. Potter* who were also subscribers; these were all consolidated. The learned Judge left it to the jury to say whether the Plaintiffs had waved the guaranty and exonerated the Defendant by making the whole of *Goodrich*'s embezzlement a debt from him? The jury found a verdict for the Plaintiff.

Le Blanc and *Shepherd* Serjts. on a former day shewed cause against a rule nisi for a new trial, and contended, that the guaranty was not waved by any thing which passed between *Goodrich* and the

(a) There were transactions which did not come within the scope of the present case.

Plaintiffs,

Plaintiffs, or by the length of time which had elapsed before notice was given to the Defendant; that with respect to the concealment it might have been dangerous for the house to have made public the misconduct of their clerk and their loss in consequence; that by the terms of the guaranty the Defendant was absolutely bound to answer for the deficiencies in *Goodrich's* accounts, and that the effect of the length of time which had elapsed was a question for the jury who had decided that it was not a waiver. They urged that the Defendant had not been injured by the delay, as *Goodrich* continued insolvent from the time that he committed the fraud to that of his death, which was just before the trial.

Cockell and *Heywood* Serjts. *contra*, insisted that the Plaintiffs had accepted *Goodrich* for their debtor, by giving him credit to the amount of the deficiency, and entering it in their books as a loan; that the danger the Plaintiffs might have incurred by making public the embezzlement in question, could not deprive the Defendant of his right to notice, as in the case of a bill of exchange, where notice of the drawer's default must be given on the earliest opportunity left his situation should be altered, and that the same rule held in cases of bankruptcy, and ought to be observed in all other mercantile transactions; and that the time within which notice should have been given was a question of law.

EYRE Ch. J. This case seems to involve many points of law ^{a H. Bl. 613.} deserving serious consideration. The 1st question is, whether a person who enters into a guaranty for the faithful discharge of duty by another be liable to answer for embezzlement of money by him at any indefinite period, or whether notice of such embezzlement ought not to be given within reasonable time? A 2nd question will be, whether the intentional concealment of such embezzlement will not discharge the guaranteee from his liability? And a 3rd, whether that degree of credit has not been given to the party originally guilty, which may be sufficient to change the character of the transaction, and by assent of the Plaintiff to convert *Goodrich's* delinquency into a debt. And if so, whether the guaranteee be answerable on the foundation of the original embezzlement? These are questions of real importance to the mercantile world, and I wish to have them deliberately considered, not being prepared to give an opinion.

BULLER J. Some things have been advanced in argument to which I do not agree. It has been said that the rights of parties have been altered. If any new debt had been incurred, or if the

demand

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demand had been enlarged, that might have been a fraud on the guaranteee. But that is not the case here. The Defendant was liable to make satisfaction for the embezzlement of *Goodrich* to the amount of his subscription, and if the Plaintiffs endeavoured to obtain any thing from *Goodrich* before they called on the Defendant, that was only in aid of the Defendant and tended to relieve him. Unless something had taken place between the Plaintiffs and the guaranteee, I do not see how the responsibility of the latter could be given up, since no favour shewn by the former to *Goodrich*, nor any thing done between them which did not create an injury to the Defendant, could discharge the guaranty.

HEATH J. This case differs from that of a bill of exchange inasmuch as the Defendant was not merely bound to pay the money in case *Goodrich* should not pay it, but was bound absolutely to pay for his deficiency.

Cur. adv. vult.

EYRE Ch. J. On this day (*absentibus Buller & Heath J.s.*) referred to the letter of the 11th of September, and said; I am much inclined to think that a reasonable inference may be drawn from this letter, which will go a great way towards laying out of the case the question how far those to whom a guaranty has been given may, by concealing the failure of the party for whom the guaranteee is answerable, and giving him credit for the amount of the failure, be considered as having taken upon themselves the whole loss. I dare say the jury were satisfied that the Defendant was not kept in ignorance of the transaction. He did not put his case upon that ground; but the ground he has taken is, that the Plaintiffs had done enough to discharge the guaranteee; upon this I at first hesitated, but am now disposed to agree with my Brothers that it is not sufficiently made out: this case therefore may stand without breaking in upon the rules of law.

ROOKE J. The points formerly stated by my Lord were all left to the jury, and I have no reason to think that they decided wrong.

Rule discharged.

May 6th.

Cockell now stated to the Court that the letter alluded to by the Lord Chief Justice on a former day, did not relate to the present Defendant but to his brother, and certainly could not affect *S. Potter*, the other guaranteee. He urged that even if a communication between the Defendant and his brother could be presumed yet that such presumption could not be extended to *S. Potter*; and

and trusted therefore, that if the Court should still think this rule ought to be discharged, they would open the consolidation rule, in order to enable *S. Potter* to defend the action.

EYRE Ch. J. The principal difficulty I felt in the case arose on the ground of a supposed industrious concealment by the Plaintiff not only from the servants of the house, but from all the world, which on general principles of law might have had an effect on the liability of the guaranteee. But looking through the case again, I think there is room to collect that there was no want of communication with the Defendant. The names of *Tatlock* and *Goodrich* are names not unknown at *Guildhall*, or in *Westminster-hall*: whether the letter related to the Defendant or his brother, there is a plain allusion to the guaranty in it. Considering either the probable issue of another trial, or the value of the interest, this is not a case in which the Court ought to open the consolidation rule. To prevent mistakes, I add that it is not to be taken to be the opinion of the Court, whatever my opinion might have been, that the case as it was stated originally by the report was attended with much difficulty.

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Ex Parte HUBBARD.

May 6th.

THIS was a petition by a prisoner in execution to be brought up to be discharged under the 32 Geo. 2. c. 28. s. 13. and was founded on the following circumstances. The prisoner having been originally confined for several debts the amount of which was too large to entitle him to the benefit of the act, had during his confinement satisfied some of his creditors, and thus reduced the amount of his debts below 300*l.* He now therefore applied to the court in this term, as the term next after that in which he had thus reduced his debt to the sum specified in the 33 Geo. 3. c. 5., by which act the benefit of 32 Geo. 2. c. 28. is extended to persons in execution for sums not exceeding 300*l.*

Clayton Serjt. moved this on a former day and now urged in support of the application that though the act directs persons desirous of being discharged under it to apply "before the end of the first term which shall be next after such prisoner shall be charged in execution," yet it appears from the preceding parts of the clause that the legislature had in contemplation a

A prisoner, who is taken in execu-
tion for more than 300*l.* and afterwards re-
duces his debt below that sum is not entitled to be discharged under the Lords' act in the next term after he has so reduced his debt unless it be also the next term after he was taken in execu-
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case where the debt after that period was elapsed, had been reduced to the stipulated sum. He cited in support of this the words, "if any person shall be charged in execution for any sum of money not exceeding in the whole the sum of 100*l.* or on which execution *there shall at any time remain due* a sum not amounting to above the said sum of 100*l.*," &c.

EYRE Ch. J. The material words of the act are "before the end of the first term which shall be next after such prisoner shall be charged in execution of his creditor;" now this is not within the first term after this prisoner has been charged in execution, though it is the next term after that in which his debt has been reduced below the sum limited. Indeed the Court will not be very anxious to establish a precedent which will enable prisoners to deal with their creditors, and thus manage to prefer some of them by paying their debts, and come in under the Lords' act against all the rest. I had almost convinced myself that the application was reasonable, and that we should be justified in ordering the prisoner to be brought up; but upon examining the act, it appears that the case is not within the words, and considering the inconvenience that may result from extending its provisions in the way required, it seems more adviseable to adhere to a strict construction.

ROOKE J. I am of the same opinion.

Clayton took nothing by his motion.

May 6th.

8 Term Rep. 364.

S.P.

Anst. 302.

3 B&F. & P. 6.

The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt and been chosen assignee under a commission of bankruptcy issued against the Defendant.

HILL v. REEVES.

THE Plaintiff having proved his debt under a commission of bankruptcy issued against the Defendant, and having been chosen one of the assignees, arrested the Defendant and held him to bail.

Le Blanc Serjt. now shewed cause against a rule *nisi* obtained on a former day for cancelling the bail-bond and entering a common appearance, and contended that this application could not be attended to, since a party has a right to sue his creditor even after he has received a dividend under the commission.

Shepherd Serjt. in support of the rule observed that this was not a motion to stay proceedings in the action, but merely to cancel

cel the bail-bond, on the ground of the hardship which the Defendant sustained in being held to bail by the Plaintiff, who as assignee had possessed himself of all his property. He urged that the Plaintiff had elected his remedy, having completely adopted the commission by becoming assignee and acting under it. (a)

The Court refused to interfere, saying that the Defendant must apply to the Court of Chancery.

Rule discharged. (b)

(a) *Vid. Aylett v. Harford and Richards*, bail of *Lowe*, 2 Bl. 1317, where an execution was set aside on the ground of the Plaintiff having adopted the commission by acquiescing under it for a year and acting as assignee.

(b) *Vid. ex parte Ward*, 1 Atk. 153, where it was said that barely being assignee without proving a debt under the commis-

sion did not amount to an election: *Ex parte Dorvilliers*, 1 Atk. 221, where the same was held with respect to a party who had chosen himself assignee. And *ex parte Capot*, 1 Atk. 219, where the Plaintiff being an assignee was permitted to proceed at law, on refunding what he had received as dividends under the commission. Also *Oliver and Another v. Ames*, 8 T.R. 364.

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WATT and Another v. DANIEL.

May 6th.

By indenture of the 21st of November 1780, executed in the county of Cornwall, an agreement was entered into between the Plaintiffs (the patentees of the new-invented steam-engine) and the Defendant's father (who was concerned in certain Cornish mines) that the latter should erect five steam-engines in Cornwall at his own expence, and pay the Plaintiffs a certain sum of money monthly during the time he should work them. These monthly sums were regularly paid up to the year 1793. The present action of covenant was brought to recover the arrears from that time, amounting to between eight and nine thousand pounds.

A rule nisi having been obtained on a former day for changing the venue from London to Cornwall, on an affidavit that the Defendant must incur great expence in bringing up witnesses from Cornwall, if the cause were tried in London, and that several persons employed in superintending the mines would be compelled to leave them, at a great inconvenience to the Defendant;

Palmer Serjt. now shewed cause, and relied on an affidavit stating that the Plaintiffs had reason to believe that a fair and impartial trial could not be had in the county of Cornwall, for that great prejudice had arisen there respecting the cause in consequence of calumnies which had been circulated concerning the Plaintiffs, and that a subscription had been entered into to defray the expences of resisting the Plaintiff's demand. He observed

The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the defendant's witnesses residing there, if from the pleadings it does not appear necessary to produce many witnesses from that country, unless a question arises of which a fair trial cannot be expected there.

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served that from the nature of the case the question to be tried must excite a strong interest in the public mind in *Cornwall*, where so many persons were under the same circumstances as the Defendant; and referred to the cases cited in the note to *Foster v. Taylor*, 1 *Term Rep.* 781. He then adverted to the Defendant's pleas (*a*), which were 1st, *Non est factum*. 2d, *Riens per dissent*. 3d, That Defendant had ceased from a certain time to use the engines, and that he had paid 11,041*l.* for the time during which he had used them. 4th, nearly the same as the 3d. 5th, *riens in arrere*; and said, that with respect to the first plea, one of the two witnesses to the deed was the Defendant in the action: that the only fact to be proved under the third and fourth pleas, was the time during which the engines were worked, which might be done by any of the workmen who attended them; and that the affirmative of all the other pleas lay on the Plaintiffs. He added that a similar application had been refused in the case of *Boulton v. Bull*.

Le Blanc Serjt. in support of the rule, relied on the affidavit which stated the Defendant's witnesses to reside in *Cornwall*, and contended that the plea shewed that all the evidence must come from that county. He insisted that nothing was to be apprehended from the prejudices of the county, as the question on the patent was now out of the case being admitted by the deed; and that as proof must be given of the times during which the engines were worked, and when they ceased working, it would be necessary to bring up a number of witnesses who had been employed about them.

EYRE Ch. J. There is no doubt that in a proper case the Court will order the venue to be changed notwithstanding the Plaintiff's right to lay it in any county. The question then is, whether this be a proper case? The first plea is *non est factum*. Now where other pleas are pleaded, which shew that the deed has been acted under, I cannot think it right for the Court to give any indulgence on the ground of that plea. With respect to *riens per dissent*, that does not require many witnesses, nor that they should reside in the county of *Cornwall*. If the third and fourth pleas are to be understood as going singly to the point how long the engines have been in use, and whether any use has been made of them since the time alleged, two witnesses will be sufficient to prove that,

(a) This he did from a notice of an application to plead those several matters and which came on afterwards.

without calling all the county of *Cornwall*. The nature of the case therefore excludes the necessity of incurring great expence or inconvenience by drawing away from the mines persons whose presence may be material. But behind this narrow view of the subject I can see a case which may make it necessary for many witnesses from the county of *Cornwall* to attend. I can hardly suppose that from the year 1793 the mines have been worked without any engines. Probably it will turn out that the Defendants mean to contend that the engines in question have not been used because others different in principle have been substituted for them. This would bring on the question with respect to the infringement of the patent, and all the points formerly raised; upon which many persons residing in *Cornwall* would be necessary witnesses. But when that very question was before the Court we were of opinion that the county was too much interested for such a question to be tried there. The only ground therefore on which the Court can allow this application in point of convenience is the very ground which has been decided upon as that on which the cause ought not to be tried in *Cornwall*. The narrow sense of the pleadings does not call for the interference of the Court, and the other sense renders it improper for the Court to accede to the application.

ROOKE J. of the same opinion.

Rule discharged.

Palmer then shewed cause against the rule for pleading the above several matters,

But the *Court* refused to interfere, and accordingly

That rule was made absolute.

LISTER one &c. v. MUNDELL.

May 6th.

THIS was an application to have a writ of *fieri facias* set aside, and the goods and money levied under it restored to the Defendant, on the ground of his having become a bankrupt subsequent to the time when the cause of action accrued, and hav-

If a *fieri facias* issued against a bankrupt before certificate obtained, be not executed till after, the Court will order

the goods to be restored; even though he has not pleaded the certificates according to 5 G. 2. c. 30. s. 7. For the Court will always give that relief in a summary way which might be obtained by *auditum querelam*. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on a plea of bankruptcy. If the testimony of witnesses on which a verdict has proceeded be founded on and derive its credit from particular circumstances, and those circumstances be afterwards clearly falsified by affidavit, the Court will grant a new trial.

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ing obtained his certificate between the day on which the writ of *fieri facias* issued and the day on which it was executed.

The debt accrued to the Plaintiff for business done as an attorney in March 1793: In November following the Defendant became a bankrupt and a commission issued against him: The Plaintiff having declared in *affumpfit* , and the Defendant having pleaded the general issue, the cause was tried at the summer assizes for York 1798, and a verdict found for the Plaintiff: on the 13th November in the same year final judgment was signed, and the *fieri facias* sued out: on the 14th the Defendant's certificate was allowed: and on the 23d of the same month the sheriff levied under the *fieri facias* in Yorkshire.

Le Blanc Serjt. in the last term opposed the application, as neither warranted by the 5 Geo. 2. c. 30. s. 7, which enables bankrupts to plead their certificate, and discharges them from all debts due before the bankruptcy, the Defendant in this case not having pleaded his certificate but only the general issue; nor by s. 13, which only authorises the Court to discharge the person of the bankrupt imprisoned after the certificate obtained. (a)

EYRE Ch. J. By refusing this application we shall drive the Defendant to his *auditá querelá* , and I take it to be the modern practice to interpose in a summary way in all cases where the party would be entitled to relief on an *auditá querelá* . (b)

Le Blanc then stated that the Defendant had lost more than 5*l.* on one day by horse-racing, and was therefore deprived of the benefit of the act by s. 12., and also that he had frequently promised payment of the debt since the certificate obtained.

EYRE Ch. J. Certainly if we entertain a summary jurisdiction in order to relieve a party from the necessity of having recourse to an *auditá querelá* , we must look into the circumstances of the case, and see whether there be any thing to prevent the *auditá querelá* from taking effect. However, as the facts now produced are collateral to the original motion, the party ought to have an opportunity of answering them by affidavit.

(a) *Ashdowne v. Fisher, Barnes 206. ed. 3.* 93. *Wicket v. Cremer, 1 Lord Raym 439.*
Cellan v. Meyrick, 1 T. R. 361. 1 Salk. 264. *S. C. Cont. Culcraft v. Swasey,*
(b) *Vid. 3 Bl. Comm. 406. Anon. 1 Salk. Barnes 204. ed. 3.*

Le Blanc then suggested that the Court might direct a trial in the first instance, in order to ascertain the truth of the facts under a plea of bankruptcy.

The Court accordingly ordered the rule to stand over: the Plaintiff to deliver a declaration; the Defendant to plead his certificate; and the parties to go to trial at the ensuing assizes.

At the trial the principal point in dispute was, whether a certain sum of money had been lost at the Scarborough races in *August 1793*, or in *August 1792*, the latter not being within twelve months previous to the bankruptcy. To prove that it was lost in 1793, the Plaintiff produced three witnesses, all of whom swore to the fact of the money having been lost in 1793, and two of them founded their testimony on particular circumstances within their recollection; viz. *Thomas Dinnis*, that till 1793 he had lived at *Hunmanby* in *Yorkshire*, and on his leaving that place had come immediately to *Scarborough*; and *Fr. William Dove*, that a child of his died about a month before the race in question took place. Verdict for the Plaintiff.

Cockell Serjt. early in this term moved for a rule nisi for a new trial, on two affidavits contradicting the particular circumstances on which the two witnesses abovementioned founded their testimony: viz. first, the affidavit of two persons who had been overseers of the poor of *Hunmanby* in the year 1791, and swore that *Thomas Dinnis* was master of the poor-house there, and was paid off and discharged by the deponents on the 22d of November in that year, and that within a few days afterwards he went and resided at *Scarborough*: Secondly, the affidavit of two other persons, who, together with the vicar of the parish where *William Dove* resided, had examined the registry of burials, and found that a child of his had been buried there on the 17th of *August 1792*, and that no other child of his had been buried there since that time. The certificate of the vicar to that effect was also produced.

The Court observed, that though it was unusual to grant a new trial on evidence contradicting the testimony on which the verdict had proceeded, discovered subsequent to the trial (a), yet as the

(a) So an objection to the competency of witnesses discovered subsequent to the trial is not a sufficient ground for a new trial. *Turner v. Pearce*, 1 T.R. 717.

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very facts on which these witnesses had founded themselves were falsified by the affidavits produced, they thought it afforded a sufficient ground for a new trial, and accordingly granted a rule nisi:

Against this *Le Blanc* was now to have shewn cause, but on a question from the Court he admitted that he could not contradict the affidavits which had been produced: and therefore the Court made

The rule absolute.

IN THE EXCHEQUER CHAMBER.

May 6th.
3. B. & P. L.
113, 114.

Under the late treaty between this country and the United States of America confirmed by 37 Geo. 3. c. 97. it is not necessary that the trade conceded to the Americans by the 13th Article should be direct from America to the British settlements in the East Indies: it may be carried on circuitously through any country in Europe, including Great Britain. A natural-born subject of this country admitted a citizen of the United States of America either before or after the declaration of American independence, may be considered as a subject of the United States so as to entitle him to trade to the East Indies under the above treaty.

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A WRIT of error having been brought in this Court on the judgment given in the Court of King's Bench between these parties, (*vid. 8 T. R. 31.*) the case was argued early in this term by *Rous* for the Plaintiff in Error and *Gibbs* for the Defendant; the general line of argument however being the same as that in the King's Bench, and much commented on in the judgment of the Court, it was thought unnecessary to do more than subjoin in the form of notes to the following judgment whatever appeared at all new or material.

The Court took time to consider of their opinion, which was this day delivered by

Eyre Ch. J. The substance of this record having been very recently stated to the Court, and the record at large being to be found in the *Term Reports*, I shall content myself with referring to it, stating so much of it only as may be necessary to introduce the questions which have arisen upon it. This is an action upon policies of insurance set forth in the first, third, and fifth counts of

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the declaration. That in the first count being a valued policy on one moiety of the ship *Argonaut*, *Collet* master, at and from *Bourdeaux* to *Madeira*, and the *East Indies*, and back to *America*, with liberty to touch stay and trade at all ports and places whatsoever or wheresoever on the outward or homeward bound voyage; and this policy is stated and found to have been effected by the Plaintiff for the use of *John Collet*. The policy in the third count being a valued policy on goods neutral property on board the same ship on a voyage at and from *Bourdeaux* to the *East Indies* with liberty to touch call and trade at all ports and places or islands whatsoever and wheresoever as well at the *Cape* as on this or the other side of the *Cape of Good Hope*, until her arrival at her port of discharge in *Bengal*; and this policy is also stated and found to have been effected for the use of the said *John Collet*. The policy in the fifth count being on goods warranted *American* property laden on board the same ship for a voyage at and from *Madeira* to her last port of discharge in *India*, with liberty to touch stay and trade at all ports places and islands whatsoever and wheresoever as well at, as on this and on the other side of the *Cape of Good Hope*; and this policy is stated and found to have been effected for the use of the said *John Collet* and one *Anthony Butler*.

The Defendant underwrote all these policies, and a loss has been sustained both of ship and cargo which is admitted to be within the terms of the policy; but it has been insisted upon the part of the Defendant that the voyages described in these policies are illegal voyages, and as such cannot be made the subject of contracts of this nature, and therefore that the Defendant is not bound by these contracts to make good his proportion of the loss.

The facts of the case upon which this charge of illegality is founded, as may be collected from the special verdict in this cause, are these: *John Collet* and *Anthony Butler* on whose account these policies were respectively effected, appear to have been natural-born subjects of His Majesty but to have been resident and domiciled within the *United States of America*, the latter before the declaration of the independence of the *United States* the former at a period subsequent to the ratification of such independence. On the 12th of June 1795 they became the owners
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of this vessel in moieties; on the 25th of July 1795 *Collet* sailed in her as master, having a cargo of corn and flour on board from *Philadelphia* for *France*, with a view of proceeding from thence with the ship after the disposal of her cargo there to *Madeira* and the *East Indies* and from thence back to the *United States*. On the 1st of May 1796 *Collet* arrived with this ship at *Brest*, and there sold his flour; he afterwards proceeded to *Bourdeaux* where he sold the remainder of his cargo, and he there shipped on his own account the goods mentioned in the second of these policies. While the ship remained at *Bourdeaux*, *Collet* came to *London*, and having procured a credit with the Plaintiff in this cause, he the Plaintiff purchased here upon his own credit by commission goods and merchandize of *British* growth and of *British* manufacture on account of *Collet* and *Butler*, and these are the goods which are the subject of the third of these policies.

The Plaintiff by the direction of *Collet* and during his stay in *London* shipped these goods in the port of *London* on the joint account and risk of *Collet* and *Butler* on board three *American* ships, in which they were carried from *London* to *Madeira* for the purpose of being there re-shipped and put on board the *Argonaut*, and of being carried in that ship together with the goods shipped on board her at *Bourdeaux* from *Madeira* to the *British* territories in the *East Indies*, and of being imported into those territories and traded trafficked and adventured in there; and it appears that at the time of this loss *Collet* and *Butler* remained debtors to the Plaintiff for the amount of these goods. On the 1st May 1796 the *Argonaut* sailed from *Bourdeaux* with the goods there taken on board her for *Madeira* in order there to meet receive and take on board the goods shipped from *London*: she arrived at *Madeira* and took those goods on board there and afterwards sailed from *Madeira* in the prosecution of her voyage to the *East Indies*, in the course of which voyage she was seized by the commander of a squadron of the King's ships on suspicion of being an illicit trader, and this has been considered throughout the cause on all sides as a total loss of the ship and cargo.

It seems to have been admitted on all sides in this cause that this voyage and the trade and traffick intended to have been carried on by the *Argonaut* with the *British* territories in the *East Indies* is to be considered as illegal and the ship an illicit trader,

unless the voyage and the intended trading were legalized by the treaty of commerce which was entered into between *Great Britain* and the *United States of America* on the 19th of November 1794, which was afterwards ratified by the *United States* on the 14th of August 1795, and by His Majesty on the 28th of October in that year and retrospectively confirmed by parliament in the 37 Geo. 3.

By the 11th article of that treaty it is agreed that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people in the manner, under the limitations and on the conditions specified in the treaty.

By the 13th article His Majesty consents that the vessels belonging to the citizens of the *United States of America* shall be admitted and hospitably received in all the sea-ports and harbours of the *British* territories in the *East Indies*, and that the citizens of the said *United States* may *freely carry on a trade between the said territories and the said United States* in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited: Provided only that it shall not be lawful for them in any time of war between the *British* government and any other power or state whatever to export from the said territories without the special permission of the *British* government there any military stores, or naval stores, or rice. The citizens of the *United States* are to pay no higher tonnage duty than *British* vessels pay in the ports of the *United States*, and they are to pay the same import and export duties as are paid by *British* vessels. It is expressly agreed that the vessels of the *United States* shall not carry any of the articles exported by them from the said *British* territories to any port or place except to some port or place in *America* where the same shall be unladen, and such regulations shall be adopted by both parties as shall be found necessary to enforce the due and faithful observance of this stipulation. This article is not to extend to allow the vessels of the *United States* to carry on any part of the coasting trade of the *British* territories: and for explanation it is added, that vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade. This article contains some other provisions by which *Americans* are to govern themselves in their intercourse with the *British* territories,

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but nothing arises upon that part of the article material to the present subject.

On the part of Mr. *Marryat* the Defendant in the action, it has been insisted by Mr. *Rous* who entered very fairly into the real merits of the case, that according to the true construction of this treaty, viewing it in all its parts and attending both to the letter and the spirit of it, the trade to be carried on between the *British* territories in the *East Indies* and the *United States*, is a direct and immediate trade from the *United States* to the *British* territories as well as from the *British* territories to the *United States*, which unquestionably must be direct and immediate, it being expressly agreed that the vessels of the *United States* shall not carry any of the articles exported by them from the *British* territories in the *East Indies* to any port or place except to some port or place in *America* where the same shall be unladen; and consequently that the voyages insured from *Bordeaux* and from *Madeira* not being protected by the policy were *ex concessis* illegal.

Mr. *Rous*'s verbal criticism (*a*) upon the word "between" was ingenious, and well supported: but in truth there is hardly a word in the *English* language less precise in it's meaning or more indefinite in it's application than the word "between." According to the context it is used to express the strictest local sense of *to* and *from*, or the most remote relation which any one thing can have or bear to another. For instance, when we say that the inlet from the *Western Ocean* to the *Mediterranean* is *between* the coast of *Spain* and the coast of the empire of *Morocco*, it marks geographical lines precisely drawn. But if we were to say that the intercourse *between* the coast of *Spain* and that of the empire of *Morocco* was interrupted by the religious opinions and the habits of living prevailing in the two countries, the word "be-
tween" would have no other effect than to point out the countries or nations whose intercourse is spoken of as interrupted by the causes enumerated, and would mean no more than what is meant by the same word in the 11th article of this treaty where the expression is "*between* their respective people." When we leave

(a) To prove that the word *between* meant *to* and *from*, Mr. *Rous* referred to the ΕΠΕΙΑ ΠΤΕΡΟΝΤΑ of *Jobn Horne Tooke*, part 1st, p. 404. ed. 2. where it is said to be a dual preposition derived from the Anglo Saxon imperative *be* and *tƿegen* or *twain*, and also to *Johson's Dictionary*, where it is interpreted "from one to an other."

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this narrow ground of argument, and proceed to consider the whole context of this article, the generality of the expressions, the most obvious interpretation of those expressions, and all the probable and possible consequences which may follow from our exposition of this article, the subject expands itself to an alarming magnitude, and the argument would take a very wide compass indeed, if it were now to be entered into for the first time: but after the very elaborate discussion which this cause has undergone in the Court of King's Bench, where a solemn judgment was pronounced at the close of a fourth argument, and considering that that judgment has now been submitted to our review upon arguments which, though very ably put, have not materially varied the state of the questions which have been made and decided upon by that Court, we do not feel ourselves called upon to enter very much at large into the subject, and I shall content myself with stating as shortly as I can the grounds upon which the unanimous opinion of this Court that the judgment of the Court of King's Bench is not erroneous and ought to be affirmed may be supported.

The language of the 13th article is that the citizens of the *United States* may freely carry on a trade between the said territories and the said *United States* in articles not entirely prohibited. They are therefore not restricted to trade in articles of the growth produce and manufacture of the *United States*: it is enough that the articles they trade in are not articles prohibited from being imported to the *British* territories in *India*, or exported from thence by any body. If then they propose to trade with the *British* territories in *India* in foreign commodities as they may do, they must use means to furnish themselves with those commodities. In the nature of things it must be done in a course of trade. The obvious course of trade is that they should carry their native commodities to other countries where they can be exchanged with the most advantage for articles proper for the *East India* market, and that they should then proceed to *India* in order to carry on a trade there in those articles. I find nothing in the treaty which will warrant me in saying that it was the intention of the contracting parties that the trade conceded by the treaty should not be so carried on. Mr. *Rous* found himself obliged to acknowledge that the citizens of the *United States* might within the terms of this treaty first import into *America* the articles in which they propose to

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trade with the *British* territories in *India*, and then export them from *America* in a direct voyage to the *East Indies*, and he could not deny that they might have imported these articles into *America* even from *London*. Indeed it would have been a most extraordinary state of things if they might have gone to every other market for the goods they wanted, but that the *British* market was excluded. And to the apparent disadvantage under which the citizens of the *United States* would carry on trade with the *British* territories in *India* so conducted, Mr. *Rous* argued, that so to understand the treaty would be only to give the fair and due preference to the great national commerce of the *East India Company*. Whether this trade should have been conceded under any qualifications or restrictions is one thing, it having been conceded now, to attempt to cramp it by a narrow, rigorous, forced construction of the words of the treaty is another and a very different consideration. We cannot suppose that an indirect advantage was intended to be reserv'd to the *East India Company* by so framing the treaty that the *American* trade might by construction be put under disadvantage; because this would be a chicanery unworthy of the *British* government and contrary to the character of it's negotiations, which have been at all times distinguished for their good faith to a degree of candour which has been supposed sometimes to have exposed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted in my opinion fixes the construction of the grant. If it were necessary to go farther strong arguments may be drawn from the context of this article and the contrast, which the comparing it with the preceding article, will produce. From the context it appears that the trade was to be *free*, subject only to certain specific regulations. The citizens of the *United States* are put upon the same footing as to duties with *British* subjects. No question is proposed, no means of ascertaining the fact are provided, where they come *from*, though it is anxiously stipulated where they are to go *to*. The words "*original cargo*" are to be found in the article and it was supposed they might be used as a ground to infer that the trade was to be direct from the *United States*. But "*original cargo*" is plainly set in opposition to the cargo to be taken in in *India*. The provision respecting it is that though the coasting trade is not permitted to the citizens of the *United States*, they may carry the cargo, which they originally brought

brought with them, into the ports of the *British* territories from one port of delivery to another for the purpose of a market. The word *original* serves the purpose for which it is used perfectly well, and it marks a total indifference to the question where the cargo was picked up. I have already had occasion to take notice that as to the cargo to be imported no other restriction or qualification was in the view of the contracting parties than that it should consist of articles not expressly prohibited. But when this article is contrasted with the preceding article, the true construction of it will be seen in a still clearer point of view. The 12th article is in substance, that it shall be lawful for the citizens of the *United States* to carry to any of His Majesty's islands and ports in the *West Indies* from the *United States* in their own vessels, not being above seventy tons, any goods or merchandize being of the growth manufacture or produce of the said states, which *British* vessels might carry to the islands from the said states, and that the citizens of the *United States* may purchase load and carry away in their said vessels to the *United States* from the islands all such articles being of the growth manufacture or produce of the islands as *British* vessels could carry from thence to the said states, provided that the *American* vessels carry and land their cargoes in the *United States* only, it being agreed that the *United States* are to prohibit and restrain the carrying any molasses sugar coffee cocoa or cotton in American vessels either from His Majesty's islands or from the *United States* to any part of the world except the *United States*, and there is a proviso that *British* vessels may import from the islands into the *United States*, and may export from the *United States* to the islands, all articles of the growth produce or manufacture of the islands or of the *United States* respectively, which by the laws of the said states might be then imported or exported.

The trade to be carried on between the citizens of the *United States* and the *British West India* islands, by virtue of this article, is required to be in goods of the growth produce or manufacture of the islands and *United States* respectively. This trade in the nature of it must be immediate and direct. It could not be in the contemplation of the contracting parties that it might be circuitous, except indeed within the limits of the *United States* and within the range of the *British West India* islands, and so far as I take it, it is circuitous. The contracting parties could not look

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to so remote a possible case as that a citizen of the *United States* might load the native commodities of the *United States* in a foreign port, and therefore we are not driven to collect the meaning of this article from the precision of the language it uses. Its language is however most precise. The *terminus à quo* and the *terminus ad quem* are designed with as much certainty as would be required in an indictment for not repairing a particular part of the King's highway. And to exclude all possibility of misapprehension, mark how entirely this trade was to be immediate and direct, a provision is added that the *United States* are to prohibit the carrying goods of the produce of the *West India* islands in *American* vessels to any port of the world except the *United States*. Thus contrasted, those articles afford an illustration of the internal evidence of the import and true intent and meaning of each considered separately, and the conclusion from the whole appears to us to be irresistible that the trade to be carried on under the 12th article between the *United States* and the *British West India* islands is a direct trade, and that the trade to be carried on between the *United States* and the *British* territories in the *East Indies* under the 13th article may be as circuitous as the enterprising spirit of commerce can make it. There may be reason to apprehend that such an intercourse with the *British* territories in the *East Indies* may prove very injurious to the interests of the *East India Company*, and to *Great Britain* in respect of the great national commerce which is carried on by that Company. In particular there may be reason to apprehend that this treaty will open a door to many of our own people whom the policy of our laws has shut out from a direct trade to the *East Indies*. In truth it can hardly be expected that the spirit of commerce, too often found eluding laws made to keep it within bounds, that the *lucri bonus odor* should not embark *British* capital in this trade. This ought to have been foreseen, and therefore I conclude it was foreseen, and that it was found that the balance of advantage and disadvantage preponderated in favour of the treaty. If not; those who advised it will have to answer for it: the responsibility is not with us. We are not even the expounders of treaties. This treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us: we only say how it is to be understood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern ourselves.

ourselves. We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are *A.* and *B.*, or happen to be two independent states. The Judges who administer the municipal laws of one of those states would commit themselves upon very disadvantageous ground, ground which they can have no opportunity of examining, if they were to suffer collateral considerations to mix in their judgment on a case circumstanced as the present case is. It has been urged that in this instance (at least as to the goods in the third policy) this was a commerce direct from this country, and that this treaty does not open a trade between *Great Britain* and the *British* territories in the *East Indies* to the prejudice of the monopoly vested in the *East India Company*. This objection is plausible but not founded. The circumstance that this part of the cargo of the *Argonaut* was procured here, and the share which the Plaintiff *Wilson* had in procuring it, might have deserved consideration as evidence of a collusion by means of which *Wilson* was carrying on for himself an illicit trade to the *East Indies* which might have subjected this ship and cargo, or this part of the cargo to seizure and confiscation. But this use has not been made of the facts found by the special verdict: and no other use, consistent with our opinion of the legal effect of the treaty, could be made of them. For a citizen of the *United States* being allowed to trade to the *British* territories in *India* generally with an exception of a few articles only, as he may take in his cargo in the ports of his own country, so he may take it in in the ports of this country as well as any other; and he may employ an agent, and that agent may be a *British* subject. It is a lawful agency. It seems to me impossible to maintain in argument that the subject of a nation in amity who may trade to the *British* territories in *India* should be excluded from one market for his outward investment when all other markets are open to him, and when it is distinctly admitted that the markets of all the world, including ours, *circuitously* must be open to him.

There remains one other topic of which I am called upon to take some notice. It is said that *Collett*, who is solely interested in the two first of these policies, and has a joint interest with *Butler* in the last, being a natural born subject of this country,

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cannot shake off that character, and become an *American* so as to entitle himself to the protection of this treaty. He is a *British* subject trading to the *East Indies*: his trade is therefore illicit: the voyages insured are illegal: and the policies are void. Or perhaps the objection ought to be put another way thus. The vessels in which only the trade can lawfully be carried on between the *United States* and the *British* territories in *India* according to the provisions of the Statute 37 Geo. 3. c. 97. must be owned by subjects of the *United States*, and whereof the master and three-fourths of the mariners at least are subjects of the *United States*: whereas this vessel the *Argonaut* was in part the property of a natural-born subject of this country, and this part-owner was also the master; consequently she was not owned by a subject of the *United States*, nor navigated by a master a subject of the *United States*, within the true intent and meaning of the navigation laws, and particularly the Statute 37 Geo. 3. c. 97. The conclusion will be the same. The voyages insured were therefore illegal and the policies void. This is the only point in the case which has appeared to me to have any difficulty in it. I must confess that when I found it stated as a fact in this special verdict that *Collett* and *Butler* were natural-born subjects of his Majesty, I felt myself embarrassed, and I could not readily disengage myself. And when I found that in the year 1797 there had been a reference (a) from the Privy Council

to

(a) By 37 Geo. 3. c. 97. s. 1. goods of the growth of *America* are allowed to be imported into *Great Britain* from the *United States of America* in *British* ships owned, navigated and registered according to law, or *American* ships "whereof the master and three fourths of the mariners at least are subjects of the said *United States*." On this a question arose, whether one *Smith* who had become a citizen of the *United States* since the declaration of independence, and came here as master of an *American* vessel, was within the meaning of the act. The case was submitted to the opinion of the King's Advocate and the Attorney and Solicitor General; which was as follows:

To the Lords of His Majesty's Most Honourable Privy Council.

May it please your Lordships,

In obedience to your Lordships' order of the 16th instant, referring to us the petition of *John Montgomery*, the representation of

Simon Cook, and papers accompanying the same, to your Lordship's order annexed, and requiring us to consider thereof, and report, whether *Alexander Smith* therein named is to be considered according to the true construction of His Majesty's order in council of the 31st May 1797, for regulating the trade between *Great Britain* and the territories belonging to the *United States of America*, as a subject of the *United States of America*, and whether he is entitled to be master of a ship belonging to the said *United States* trading to this country, and to confer on the said ship the benefit of the said order in council: We have considered the said papers so referred to us, and we are of opinion, that *Alexander Smith*, being a natural-born subject of His Majesty, and not having been admitted a citizen of the *United States of America* until the 6th of May 1796, cannot be considered, with respect to this country, as a subject of the *United States*, so as to entitle him to be master of a ship belonging to the *United*

to the then Advocate General, and the two law officers of the Crown, and that they had concurred in opinion that the master of an *American* vessel a subject of the *United States* domiciled there, but in fact a natural-born subject of *Great Britain* was not to be considered as a subject of the *United States* within the meaning of our navigation laws, founding themselves upon an opinion of Lord *Hardwicke* when he was Attorney General, and that the Council had adopted and acted upon that opinion, I felt my difficulty increase upon me: for, though this was not a judicial decision, (as in the argument at the bar of the Court of King's Bench it was supposed to be,) it was certainly of the highest authority next to a judicial decision: it was a public act of the executive government, founded on the advice of eminent and learned men, whose situations called upon them to make themselves well acquainted with our nava-

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United States trading to this country, and to confer on the said ship the benefit of the said order in council. We apprehend that this point was submitted to the opinion of Sir Philip *Torke* [1], in 1732, in the case of a *Scotchman*, who had been made a burgher of *Stockholm*, and was the master of a *Swedish* ship navigated with *Swedish* mariners; and that he thought this would not entitle the *Scotchman* to be considered as a *Swede* in *Great Britain*, his native country.

All which we humbly submit to your Lordships' consideration.

WILLIAM SCOTT,
June 19, 1797. JOHN SCOTT,
JOHN MITFORD.

In consequence of the above opinion the following letter was written for the information of the Lords Commissioners of the Treasury, and acted upon by them:

Council-Office, W^hitehall,
Sir,
23d June 1797.

The Lords of His Majesty's most honourable Privy Council having had under consideration a report of His Majesty's Advocate, Attorney and Solicitor General, on the petition of *John Montgomery*, and a representation of *Simon Cock* his agent, and papers accompanying the same, requesting the entry at the port of *Liverpool* of the American ship *America*, *Alexander Smith* master, from *New York*; notwithstanding it has been objected to, on the grounds of the master of the said ship not

possessing all the qualifications of an *American* subject; I am commanded by their Lordships to transmit a copy of the said report to you for the information of the, Lords Commissioners of His Majesty's Treasury, and I am to signify that the Lords of the Council agree in opinion with His Majesty's Advocate, Attorney and Solicitor General, that a *British* subject cannot so divest himself of the character of a *British* subject, by being naturalized or becoming a citizen of any foreign state, as to entitle him to be considered, in this country, as a subject of such foreign state, under the laws of navigation. And their Lordships are further of opinion, that for many reasons it would be very contrary to the interest of this country to admit of such a claim, yet, as this is the first case with respect to the *United States of America* in which a claim of this nature has been brought forward, their Lordships do not think it would be proper to take advantage of the forfeiture of the said ship, &c. and are even of opinion, that under all the circumstances of the present case, the said ship *America* should, according to the request of the memorialist, be permitted to enter the cargo at the port of *Liverpool*; I am however directed by their Lordships to desire that a copy of the said report may be transmitted to the Commissioners of His Majesty's Customs, and that they may be informed, that after such notice a like indulgence will not be granted.

I am, &c.
Geo. Rose Esq. W. FAWCETT.

[1] Vide *Ross's Law of Shipping*, 252.

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tion laws, and must have made them very familiar with all the questions which had arisen upon those laws: and it was therefore entitled to very great respect from me. It may be observed, that this order might have been followed by a judicial decision. It purports to recommend, that under the actual circumstances the vessel should be admitted to an entry though she was not navigated according to law. Notwithstanding the order and the entry in consequence of it, the vessel might have been seized and prosecuted in the Exchequer, and so the question might have been brought to a judicial decision. It was done in the case of *Scott qui tam v. Schwartz*, Com. 677. cited in the argument. By the way I do not understand upon what ground the case of *Butler* was distinguished from *Collett's* case, unless *Butler* has been expressly discharged from his allegiance by act of parliament, in consequence of our acknowledgment of the independence of the *United States*. They were both natural-born subjects, they were both adopted subjects of the *United States*, and it is to be said of both *Nemo patriam in quā natus est exire, nec legeantiae debitum ejurare posse*. It was observed by Lord *Hale*, that a natural-born subject of this country may by foreign naturalization entangle himself in difficulties and a conflict of duties. So may the naturalized or denizen subject of the King of *Great Britain*. Yet it is clear, that we and all the civilized nations and states of *Europe* do adopt (each according to their own laws) the natural-born subjects of other countries. So, as I take it, *Vattel* (a) puts it in the passages referred to. Our laws give certain privileges and withhold certain privileges from our adopted subjects, and we may naturally conclude, that there may be some qualification of the privilege in the laws of other countries. But our resident denizens are entitled, as I take it, to all sorts of commercial privileges which our natural-born subjects can claim. We should consider them as *English* in the language of the Navigation Act. The *United States* do undoubtedly consider their adopted subjects as subjects of the *United States* within their laws. And I take it that we should consider their adopted subjects, if they happen not to be natural-born subjects of the King of *Great Britain*, as subjects of the *United States* within our navigation laws. To this proposition I take the case of *Scott v. Schwartz* to be in point, if it wanted an authority. The case now begins to work itself clear. It comes to this question: What difference does the circumstance of the adopted sub-

(a) *Lib. 1. c. 19. f. 212. & seq.*

ject of the *United States* being a natural-born subject of the King of *Great Britain* make? Is there any general principle in the law of nations (out of which this adoption of subjects seems to have grown) that in the parent state the adopted subject is incapable of enjoying the privileges which have been conceded by the parent state to the other subjects of that state which has adopted him? I know of no such disabling principle. Let us then come to our own municipal law. Lord *Hale* says foreign naturalization may involve the natural-born subject in a conflict of duties. This is eloquence but not precision. What are the duties of which there may be a conflict? Our laws pronounce, that if there should be war between his parent state and the state which has adopted him, he must not arm himself against the parent state. Perhaps they go further and say, that if he is here he may be prevented from returning to his domicile in the state which has adopted him: that if he is there, he must on receiving the King's commands under his privy seal return hither on pain of incurring a contempt and penalties consequent upon it. Whether the proclamation (a) which has been introduced into this cause will have the same effect as a privy seal served upon the party, is a question not necessary to be here discussed. It cannot have a greater effect, nor an effect of a different nature, and may therefore be laid out of the case. Our municipal laws may attach upon him in some other cases, but I conclude in no instance which by analogy can govern the present case, because I have heard of no such argument from analogy. Upon what authority then is it said, that a natural-born subject of the King of *Great Britain* shall not trade to the *East Indies*, though he is an adopted subject of another country whose subjects in general are allowed to trade to the *East Indies*? Shall it be enough to say the rest of the King's subjects are not allowed to trade to the *East Indies*, and therefore you being the King's subject shall not? He will answer, I have a privilege which the rest of the King's subjects have not. I am the King's subject, but I am also the subject of the *United States*, and *Great Britain* has granted to the subjects of the *United States* that they may trade. He may add, I violated no law of my parent state, in procuring myself to be received a subject of the *United States*. She encourages the practice, for she herself adopts the subjects of other states. Why then are the fruits of my adoption to be withheld from me? If it be said to him, you a *British* subject ought not to trade to the loss and injury of the *East India Company*

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who have a monopoly : he may say, the subjects of the *United States* may and ought to carry on this trade under the authority of the laws of this country ; under the authority of the same laws which gave to the *East India Company* their monopoly. If the Company sustain a loss, it is *damnum sine injuriā*. In short, it being once granted that natural-born subjects of the King of *Great Britain* may become subjects of the *United States*, there can be no breach of moral, political, or legal duties, no conflict of duties in claiming or exercising the privileges which belong to that character. The same train of reasoning, in my judgment, goes to prove that it is not yet sufficiently established to be now taken for clear law upon the ground of which we ought to declare these contracts void, that a natural-born subject of the King naturalized, or otherwise adopted as a subject by a foreign state, is not to be considered within our navigation laws as a subject of that foreign state when acting in the character of the master of a vessel belonging to the subjects of that foreign state. Such a man is certainly to many purposes, "of that country or place" which are the words of the Navigation Act, and "a subject of the *United States*," which are the words of the Stat. 37 Geo. 3. c. 97. In point of title to this character of subject, he is sufficiently so within our navigation laws. I mean that he is sufficiently adopted, according to the case in *Comyns*, to be considered a subject of that country within our navigation laws, supposing his claim not to be repelled by his being a natural-born subject of *Great Britain*. I am not prepared to say, highly as I respect the authority of those who held that opinion, that this character of natural-born subject will control or suspend the legal operation of that of a subject of the *United States*. There is here no conflict of duties. Both characters may stand together ; and if some political inconveniences, such as those suggested in the argument before us, (though these seem very remote,) should follow, yet if these inconveniences are not of consequence enough to prevent the practice of the adoption of subjects by *Great Britain* and every other state in *Europe*, we cannot satisfy ourselves that they ought to control the legal consequences of that adoption. We are of opinion that there is no error in this judgment, and that it ought to be affirmed.

Judgment affirmed.

Mr. Justice BULLER was absent from the 20th and Mr. Justice HEATH from the 24th of April to the end of the term, from indisposition.

THE END OF EASTER TERM.

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Trinity Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

WILTON Executrix v. HAMILTON.

May 6th.
2 East, 396.
2 Bof. & Pull.
256.
3 Bof. & Pull.
116.

THIS was an application to the Court to direct the prothonotary to tax costs against the Plaintiff who had been nonsuited. The ground on which it was attempted to differ this from the common case of an executrix were as follow. The plaintiff declared as executrix of her husband on a policy of assurance effected by him in his life-time, and in which he was jointly interested with two others. The 1st count stated, that the testator in his life-time, for the use of himself, S. L. and S. B., effected the policy for himself, and as agent, &c.; that the testator, S. L. and S. B., were interested &c.; that afterwards, *in the life-time of the testator*, the ship sailed on her voyage, *and that afterwards* and during the voyage she was lost. The 2d count only differed from the first in some circumstances which could not effect this motion. The 3d and 4th were money counts, stating that the Defendant was indebted to the Plaintiff as executrix, for money paid by the testator in his life-time to the use of the Defendant, and for money had and received by the Defendant in the life-time of the testator to his use.

A. sued as executrix of B. on a policy effected by B. in his life-time, in which he was jointly interested with C. and D. now living, and was nonsuited, held that she was entitled to the privilege of an executrix to be exempt from costs.

Heywood Serjt. moved this on the last day of Easter term, but was at that time refused a rule nisi by the Court, who said they would

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would not stir the point unless upon further consideration of the case he should think the motion well founded.

Accordingly on this day he again applied for a rule to shew cause and contended, that this case did not fall within the general rule, that where an executor sues in right of his testator for a cause of action arising in the life-time of his testator, and the estate will be benefited by a recovery, he shall not pay costs. 1st, Because it did not appear upon the pleadings that the cause of action accrued in the life-time of the testator, for though the policy was stated in the two first counts to have been made by him, yet it was not shewn that the loss happened before his death, and the money counts were on promises made to the Plaintiff. 2dly, Because the Damages if recovered would not have been assets, but must have been carried to the partnership fund and liable to the partnership debts; and 3dly, because it was not necessary for the executrix to have brought this action, as either of the surviving parties interested might have supported it. He cited *Jenkins and Wife v. Plombe*, 6 Mod. 92. 181. *Modely and Wife v. York*, 11 Mod. 135. *Marsh v. Yellowley*, 2 Str. 1106. *Nicolas v. Killigrew*, 1 Id. Raym. 436. *Harris et Ux. v. Hanna*, Caf. temp. Hardw. 204. and *Bollard v. Spencer*, 7 Term Rep. 358.

Le Blanc Serjt. shewed cause in the first instance, and infisted, that it might be inferred from the pleadings that the cause of action accrued during the life of the testator.

EYRE Ch. J. On the two first counts we may infer, that the loss happened in the life-time of the testator, and with regard to the money counts, the promise is an implication of law, since the testator is the person to whom the debt is substantially due. The Plaintiff was entitled to bring this action, and she could only bring it in right of her testator. The rule of law is clear. With regard to such causes as fall under the cognizance of the executrix herself, she sues at her peril; the privilege is given on account of the situation in which she stands as to those claims of the testator which were executed in his life-time. It is her duty to convert those claims into assets, which she must do with ignorance and uncertainty, and on that account she is protected from costs.

BULLER J. I am of the same opinion. It makes no difference that the surviving parties for whose interest this policy was made might have brought the action in their own names.

Heywood took nothing by his motion.

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SARAH LEGH v. FRANCES LEGH.

May 30th.

ON a former day *Shepherd* Serjt. shewed cause against a rule nisi obtained by *Le Blanc* Serjt. for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this: *Frances Legh* having given a bond to *Sarah Legh* to secure 75*l.* *Sarah* assigned it to *John Legh* as a security for the payment of a lesser sum, of which *Frances* had notice: *John* having brought an action on the bond against *Frances* in the name of *Sarah*, *Sarah* gave a release to *Frances* by whom she had been satisfied her debt, and this release was pleaded.

EYRE Ch. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

Shepherd on this day stated that the Defendant objected to going before the prothonotary, upon which the *Court* said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the statute to plead several pleas, the Court had no discretion.

EYRE Ch. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against

If the obligor of a bond, after no notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the Court will set the plea aside; nor will they under these circumstances allow the obligor to plead payment of the bond.

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against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court (*a*). And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the Defendant consented to go before the prothonotary.

2 Espin. N.P.C.
657.

(*a*) See also *Payne v. Rogers, Doug. 407.* where the tenant of a commonable tenement, having been made nominal Plaintiff by his landlord in an action on the case for an incroachment on the common, gave a release to the Defendant pending the suit, the Court on motion ordered the release to be delivered up to be cancelled, and permitted the action to proceed in the name of the tenant, expressing great indignation at the attempt made to prevent it. Indeed in *Salk. 260. Holt. Ch. J.* says, that in ejectment where the Plaintiff is a mere nominal person and trustee for the lessor, if he re-

lease the action he may be committed for a contempt. *Lawrence J.* mentioning this opinion in the case of *Bauerman v. Redenir, 7 Term Rep. 670.* adds "but he did not say that the release would not defeat the action." If it would necessarily defeat the action, an objection might have been taken to the pleading in *Craig and Wife v. D'Aelb, 7 Term Rep. 670. n. 8.* where a release having been pleaded to an action on a bond by the assignee of the bond in the name of the obligee, the special circumstances under which the release was given, and that it was obtained by fraud, were replied.

May 30th.

2 Bof. & Pull.

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If bail plead the bankruptcy of their principal in their own discharge, they must plead it circumstantially, or it will be bad on special demurrer. *Quare* if it can be pleaded at all?

DONNELLY v. DUNN.

DEBT on a recognizance against the Defendant as bail of one *Robert Maclagan.* Plea: That the said *Robert Maclagan* after the entering into the recognizance in the declaration mentioned and before the return of any writ of *capias ad satisfaciendum* against the said *Robert Maclagan* upon the said judgment in the said declaration also mentioned to wit on &c. at &c. became and was a bankrupt within the true intent and meaning of the several statutes made and then and now in force concerning bankrupts. And that the said *Robert Maclagan* having so become and being such bankrupt as aforesaid afterwards and before the return of any writ of *capias ad satisfaciendum* against him

him upon the said judgment to wit on &c. at &c. a certain commission of bankrupt was in due manner awarded and issued forth against him the said *Robert Maclagan* under the great seal of *Great Britain* directed to certain commissioners therein named under which said commission he the said *Robert Maclagan* was afterwards in due manner adjudged and declared a bankrupt to wit at &c.; that the said *Robert Maclagan* having been so adjudged and declared bankrupt as aforesaid and having in all things conformed himself as such bankrupt to the several statutes concerning bankrupts, he the said *Robert Maclagan* afterwards and before the return of any writ of *capias ad satisfaciendum* against him upon the said judgment in the said declaration mentioned to wit on &c. at &c. in due manner obtained from the major part of the commissioners acting under the said commission and from sufficient in number and value of the creditors who had proved their debts under the said commission his certificate of conformity to the several statutes made and then in force concerning bankrupts which said certificate was afterwards and before the return of any writ of *capias ad satisfaciendum* against the said *Robert Maclagan* upon the said judgment in the said declaration mentioned and also before the suing forth of the original writ of the said Plaintiff against the said Defendant to wit on &c. at &c. in due manner allowed and confirmed by the Lord High Chancellor of *Great Britain* according to the form of the Statute in such case made and provided. And that the said commission of bankrupt hereinbefore mentioned is still in full force and that the cause of the said action or suit in which such judgment was so recovered as aforesaid against the said *Robert Maclagan* accrued before such time as the said *Robert Maclagan* so became a bankrupt as aforesaid to wit at &c. And this &c. Wherefore &c. To this there was a special demurrer, assigning for causes "that the said plea does not state that the said *Robert Maclagan* was a trader within any of the Statutes made concerning bankrupts. And that the said plea does not state how or in what manner the said *Robert Maclagan* became a bankrupt. And that the said plea does not state that the said *Robert Maclagan* owed any debt or debts upon which the said commission in the said plea mentioned could legally have been awarded or issued. And that the said plea does not state that the said commission was awarded or issued upon the petition of any person or persons to whom the said *Robert Maclagan* was indebted. And that the said

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plea is in other respects defective insufficient and informal." Joinder in demurrer.

Le Blanc Serjt. in support of the demurrer observed, 1st, That the bankruptcy and certificate of the principal were not usually pleaded in discharge of bail, but that the Court exercised a summary (*a*) jurisdiction where the principal had obtained his certificate before the bail were fixed. 2dly, That the 5 Geo. 2. c. 30. gives the general plea of bankruptcy to the bankrupt only, and that in all other cases bankruptcy must be pleaded in the same manner as was necessary before that Statute; he cited *Tulley v. Sparkes and others*, 2 *Ld. Raym.* 1546. 2 *Str.* 869. S. C.

Marshall Serjt. who was to have argued in support of the plea, finding the opinion of the Court against him, moved for leave to amend, which was accordingly granted.

BULLER J. expressed a doubt whether the Defendant should not have sought relief by an application to the summary jurisdiction of the Court, instead of pleading the bankruptcy and certificate of the principal. (*b*)

(*a*) Vid. *Woolley v. Cobbe*, 1 *Burr.* 244. and *Cockerill v. Owston*, 1 *Burr.* 436.

(*b*) In the course of this term the following case was also decided:

Beddome and another v. Holbrooke and another.—*Scire facias* on a recognizance of bail. To this the Defendants pleaded "that R. H. (their principal) in the said writs of *scire facias* and declaration thereon mentioned after the recovery of the said judgment and before the issuing of the said first *scire facias* and before any *capias ad satisfaciendum* sued forth upon the judgment aforesaid at the suit of them the said Plaintiffs against the said R. H. had been returned and filed to wit on &c. at &c. became a bankrupt within the true intent and meaning of the several Statutes made and now in force concerning bankrupts. And that the said R. H. having so become bankrupt as aforesaid afterwards and before any such writ of *capias ad satisfaciendum* was sued forth at the suit of the said Plaintiffs against the said R. H. on the judgment aforesaid to wit on &c. at &c. did duly obtain his certificate according to the form of the Statute in

such case made and provided. And the same certificate was afterwards and before the return and filing of any such *capias ad satisfaciendum* and also before the issuing of such writ of *scire facias* as aforesaid to wit on &c. at &c. duly allowed and confirmed according to the form of the Statute in such case made and provided. And this &c. Wherefore to." The Plaintiffs put in a replication, to which there was a special demurrer.

Sherpherd Serjt. was proceeding to argue in support of the demurrer to the replication, but *Runnington* Serjt. on the other side referred the Court to the plea as radically bad.

Of this opinion were the Court. And

BULLER J. (*absente* EYRE Ch. J.) said, the plea is bad on every account. The general plea is only given to the bankrupt himself. And I am by no means satisfied, that the bankruptcy of the principal can be pleaded by the bail. It may afford ground for the Court to give relief on motion, but I do not see how it can be made a legal defence.

Judgment for the Plaintiff.

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VAN BRAAM v. ISAACS.

June 3d.

THIS was an application calling on the Plaintiff's executor to shew cause why a warrant of attorney given to secure an annuity should not be delivered up to be cancelled, and the judgment entered thereon be set aside. It was moved on two objections to the memorial, *viz.* 1st, That neither the warrant of attorney or the annuity bond was sufficiently described: 2dly, That the names of the witnesses to those two instruments were not mentioned.

The memorial set out an indenture bearing date the 20th of August 1781 between the Plaintiff and Defendant, which indenture after reciting that the Defendant had executed a bond bearing even date with the said indenture in the penal sum of 1000*l.* conditioned for the payment of an annuity of 100*l.* to the Plaintiff, and also that for the better securing the said annuity the Defendant had executed a warrant of attorney of the same date, proceeded to the grant of the annuity. The witnesses to the indenture were regularly stated in the memorial, but no other notice was taken of the bond and warrant of attorney than what was introduced by the recital in the deed. The grantee was dead.

Marshall Serjt. in the course of the last term shewed cause. The object of the act, as appears by the preamble, was to prevent secrecy in annuity transactions; and it was with that view that all the deeds were ordered to be memorialized, and all the witnesses to be mentioned. The answer therefore to the first objection is, that the bond and warrant of attorney having been mentioned in the recital of the deed, the public is equally informed of all the securities, as if a substantive allegation had been made of the bond and warrant of attorney. Mentioning the consideration by way of recital has been held sufficient. *Sowerby v. Harris*, 4 Term Rep. 494. and *Hodges v. Money and another*, 4 Term Rep. 500 (a). With respect to the second objection, it is only necessary that the names of all the witnesses should appear on the face of the memorial. The reason is obvious; that every person interested may be able to get at all the evidence relative to the transaction. But it appears from the bond and warrant of attorney now in court, that the witnesses to the indenture were also witnesses to

If a bond and warrant of attorney given to secure an annuity, are no otherwise noticed in the memorial, than by way of recital in the annuity deed which is set out, it is not a sufficient compliance with the 17 Geo. 3. c. 26. Nor can the Court refuse to interfere on the ground of 18 years having elapsed since the grant, and the grantee being dead.

(a) *Vid. etiam Cowpe v. Thompson*, 6 Term Rep. 335.

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those instruments. Besides, admitting the objections to be valid, the Court will not give them effect after the death of the grantee, and in a case where the annuity has stood eighteen years unimpeached (a).

Le Blanc Serjt. in support of the rule. The Court has never refused to interfere on account of the death of the grantee, except in cases where the application has been made on the ground of something which passed at the time of granting the annuity, and which the grantee only could contradict; as where part of the consideration-money has been retained or paid back: and with respect to the length of time which has elapsed since this annuity was granted, it is sufficient to say that the grantee has enjoyed for eighteen years, an annuity for which he gave only five years purchase, and which he never ought to have enjoyed at all. This clearly is only a memorial of one deed instead of a memorial of "every deed" as required by the act. A mere recital in the indenture of a bond and warrant of attorney cannot be a sufficient compliance with the act; since mention of those instruments may have been introduced with a view to take a sum of money under pretence of a charge for the deeds, and they may never have been executed. This case may be distinguished from those in which a recital of the consideration has been held sufficient; for if the whole consideration recited be not actually paid, the annuity is void under the fourth section of the act. As to the second defect, it cannot be cured by matter dehors. The memorial runs "which said *indenture* is witnessed by A. and B." How then is the grantor or any other person interested given to understand that the other instruments referred to were witnessed by the same persons.

EVER Ch. J. As at present advised I do not see how these objections can be got over. The cases which have been cited in support of this memorial only tend to establish that a statement by way of recital of the contents of a deed is sufficient; for the consideration is part of the contents of the deed. Perhaps there may be good ground to support those cases. And yet it is apparent that the consideration recited in the deed and the true consideration may be very different things. The object of the 17 Geo. 3. c. 26. having been to give every opportunity of scrutinizing annuity transactions, perhaps the better construction would

(a) *Vid. Symonds v. Mortimer*, 5 Term Rep. 140. *Withy v. Woolley*, 7 Term Rep. 540. and *Poole v. Cabanez*, 8 T. R. 328, in which last case the annuity having been regularly paid during the life of the person who nego-

tiated the annuity for the grantee, the Court refused to set the annuity aside on a representation of facts which that person only could have answered.

have

have been to have required a positive allegation of the consideration actually paid. However as the consideration is always to be found in the body of the deed, it may have been reasonable to hold that a memorial of the deed should be a memorial of the particular parts of the deed specified. But how can that determination affect other instruments which are quite *dehors* the deed, and on what construction are we to dispense with the memorial of any deeds, when the Statute requires a memorial of every deed? Can it be said that a memorial of one deed which recites other deeds to have existed is a memorial of every deed recited? If an act requires all the deeds of a mortgage to be inrolled, and the bond recites the indenture of mortgage, will it be contended that by the enrolment of such a bond the law is satisfied? With regard to the names of the witnesses the same difficulty occurs. If we could dispense with a distinct memorial of the bond and warrant of attorney, we might be satisfied without a description of the witnesses to those deeds: referring for the witnesses to the principal deed. However I should wish the Court to pause before it exercises a summary jurisdiction in the case of a grant made eighteen years ago; and in which the grantee is dead. This being an application to the general summary jurisdiction of the Court over all warrants of attorney, I see no reason why we should not expect the same rules to be followed in this, as in other applications to our summary jurisdiction; we require them to be made in the first instance, and before the rights of parties are fixed and determined. There is a clause in the 17 Geo. 3. by which the Court is directed to interfere, but that relates to cases of fraud, and there we are empowered to order the securities to be delivered up to be cancelled. In this case if we act, it will be on our general jurisdiction, and not under the 17 Geo. 3.

BULLER J. The question with respect to the discretion of the Court principally depends on the nature of the instrument. In this case if the Court do not interpose in the manner pointed out, I do not see how they can interpose at all. By the instrument which has been given the question is concluded. And I apprehend that in all cases where a party is precluded by a warrant of attorney from litigating a question which ought to be tried, the Court will interfere. The words of the act give us no discretion.

HEATH J. Had this been a recent transaction I should have had no doubt. The only question is, whether the Court has

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any discretion. With respect to the length of time which has elapsed, I think that there is a great difference between an annuity which is paid quarterly, and a debt of which the party never thinks till he is called upon to pay.

ROOKE J. I think the Court have no discretion, but are bound to set aside the annuity.

Cur. adv. vult.

The cause having stood over until this day, *Le Blanc* now mentioned it to the Court, and informed them, that in the course of last term and the present, two annuities granted by the same person had been set aside in the Court of King's Bench notwithstanding the same length of time had been suffered to elapse.

On hearing this, the Court made

The rule absolute.

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The Court will not put off a trial on account of the absence of a material witness, if by his evidence the defence of slavery is intended to be established.

SHEPHERD Serjt. moved to put off the trial in this cause on account of the absence of a material witness. He stated that the action was brought for wages supposed to be due to the Plaintiff as a seaman, upon a voyage from the *West Indies* to *London*, and that the defence to be established by the evidence of the absent witness, was that the Plaintiff was slave to the Defendant who had paid a valuable consideration for him.

Sed per Curiam. This is an odious defence, to which the Court will give no assistance. If the Defendant were to offer to put it on the record, we should not give him a day's time. It is as much a denial of justice as the plea of alien enemy, which is always discouraged by the Court.

Shepherd took nothing by his motion.

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Executors of T. ROTHLEY.

Covenant. The declaration stated "that one *Margaret Gardner* was possessed of certain premises for the residue of a term of ninety-nine years determinable on the deaths of certain persons then living, and being so possessed, by indenture dated the 7th of September 1770 between the said *M. Gardner* of the first part *T. Rothley* of the second part and the Plaintiffs of the third part reciting that *M. Gardner* was possessed of a lease of parcel of the said premises determinable on the deaths of *Anne Foy* and *J. Chandler* and of a lease of certain other parts determinable on the deaths of *Anne Gardner* the said *M. Gardner* and *Seymour Love* that a marriage was agreed upon between the said *M. Gardner* and *T. Rothley* and that the said leases should be assigned to trustees upon trust, it was witnessed that the said *M. Gardner* with the consent of *T. Rothley* assigned the said leases to the Plaintiffs in trust among other things for the said *T. Rothley* for his life; that *T. Rothley* covenanted with the Plaintiffs that as often as any of the persons on whose lives the premises were then held or should be held from the time being should die, he would forthwith use his utmost endeavours to renew the same premises respectively with the lords of the fees thereof by purchasing of them new lives or a new life therein respectively and such further terms estates and interest therein as before mentioned determinable on some other new lives or a new life in the room of such lives or life as should so happen to die as aforesaid, and to procure new leases to be granted thereof by the said lords respectively to the said Plaintiffs upon the trusts in the indenture mentioned and that he would pay the fines or consideration money of the renewals and the expences of the leases and other charges; that the marriage took effect; that *M. Rothley* formerly *M. Gardner* died in 1772 and that *T. Rothley* survived her." First breach "that the said *T. Rothley* did not after the death of the said *M. Rothley* his wife she being one of the persons on whose lives the premises were held forthwith and as soon as he reasonably might and ought to have done or at any time afterwards use his utmost or any endeavours to renew the same premises respectively with the

If a lease for 99 years determinable on 3 lives be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held, shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if, upon one of the lives failing he procure a renewal upon his own life.
 Performance pleaded otherwise than in the terms of the covenant, is bad, even on general demurser.

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lords of the fees thereof by purchasing of them a new life therein respectively or such further terms estates and interests as in the indenture mentioned determinable on some other new life in the room of the said *M. Rothley* his wife so deceased as aforesaid and procure new leases to be granted thereof by the said lords to the Plaintiffs upon the trusts in the indenture mentioned, although he might and could have renewed &c. and procure new leases &c. but neglected &c." On the 2d, 3d, and 4th breaches issues were joined. Fifth breach "that during the life of *T. Rothley*, *M. Rothley Anne Gardner J. Chandler* and *S. Love* died, yet *T. Rothley* did not after the deaths of them or any of them they being persons on whose lives the premises were held use his utmost endeavours to renew the premises by purchasing new lives &c. in the room of the said *M. Rothley Anne Gardner J. Chandler* and *S. Love* according to the form and effect of his covenant although in his lifetime he might and could have so done, but on the contrary on the death of *T. Rothley* there remained and was one life and no more, for and during which was held any term estate or interest whatsoever in the said premises, contrary to the form and effect of the covenant &c.

Pleas. To the 1st breach, "That *T. Rothley* did forthwith and as soon after the death of *M. Rothley* his wife as he reasonably could or ought to have done to wit on &c. use his utmost endeavours to renew the said premises respectively with the lords of the fees thereof, and did actually renew the same by purchasing a new life, *that is to say the life of himself the said T. Rothley therein in the room of the life of the said M. Rothley his wife*, and although *T. Rothley* in his lifetime did not thereupon procure new leases to be granted to the plaintiffs, but procured them to be granted to himself, yet that the Defendants as his executors after his death offered to assign the leases to the Plaintiffs, but that the Plaintiffs refused to accept them or any assignment of them, and that the Defendants are still ready and willing to assign them &c. And this &c. Wherefore &c." To the 5th breach, "That *T. Rothley* did forthwith and as soon after the death of *M. Rothley* his wife as he reasonably could or ought to have done to wit on &c. use his utmost endeavours to renew the said premises respectively with the lords of the fees thereof and did actually renew the same by purchasing a new life *that is to say the life of the said T. Rothley therein in the room of the life of the said M. Rothley his wife*, and that the said

T. Rothley in his lifetime forthwith and as soon after the death of the said *Anne Gardner &c.* did use his utmost endeavours &c. and did renew by purchasing a new life that is to say the life of one *W. Haynes* in the room of the life of the said *Anne Gardner*. And that the said **T. Rothley** in his lifetime forthwith and as soon after the deaths of the said *J. Chandler* and *S. Love &c.* did use his utmost endeavours to renew the said premises held during the lives of the said *J. Chandler* and *S. Love* with the lords of the fees thereof, and did make application to the said lords to permit him to renew the said premises by purchasing of them new lives respectively, or such further terms estates and interest therein as in the said indenture mentioned determinable on some other new lives, in the room of the said *J. Chandler* and *S. Love*; but the said lords wholly refused to permit the said **T. Rothley** to renew the same by purchasing any new life or lives or any further term estate or interest in the premises, and from thence continually till the death of the said **T. Rothley** did refuse so to do. Wherefore on the death of the said **T. Rothley** there remained and was one life and no more for and during which was held any term estate or interest in any of the premises aforesaid. And this &c. Wherefore &c.

To these two pleas there were general demurrers, and joinders therein.

Shepherd Serjt. in support of the demurrer to the 1st plea contended, that according to the spirit of the covenant **T. Rothley** was bound to leave the estate at his death in as good a condition as he received it, viz. with three *ceſtuy que vies* living; that a covenant to renew as often as any of the persons on whose lives the premises were held should die, there being three such persons, amounted to a covenant to keep up three lives: and that **T. Rothley** by having put in his own life in the room of that of his wife, had left the estate at the time of his death in the same situation as if he had not renewed at all. He referred to *Cooke v. Booth, Cwp. 819.*, to shew that the Court would extend covenants for renewal beyond the strict letter of the covenants if it appeared consistent with the intention of the parties. He added, that no offer by the Defendants as executors of **T. Rothley** to assign the leases made out to him, which ought to have been made out to the Plaintiffs, could be deemed a performance of **T. Rothley's** covenant.

The Court, after inquiring if there was any authority to shew that under such a covenant as the present a party is restricted from putting

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putting in his own life, and no such case being produced, said; As it was in the power of the parties to provide against what has been done by inserting a covenant, that *T. Rothley* should leave the estate with as many lives as he received it, and they omitted to do so, there was fair ground for *T. Rothley* to put in his own life, that he might avoid the burden of again renewing on the death of the person he should put in. It was natural for *T. Rothley* who had the beneficial interest to renew with his own life; and to construe the covenant in the way contended for by the Plaintiffs, would be introducing a restriction which the parties themselves did not conceive necessary. However as it is very clear that the Defendants' offer to assign the leases does not amount to a performance of *T. Rothley's* covenant, there must be judgment for the Plaintiff.

Le Blanc Serjt., who was for the Defendants, insisted, that they were entitled to judgment on the 2d plea, the only remaining objection to which was, that it did not aver performance in the terms of the covenant, which being a point of form could not be taken advantage of on a general demurrer.

But the Court were of opinion that the omission was matter of substance.

Judgment for the Plaintiff.

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12 Esgt, 64.

WYBURD v. TUCK.
Idem v. DYSON.
Idem v. SMITH.
Idem v. HOLBROOK.

If a composition for tithes is made by *A.* as proprietor and he leaves them to *B.*, whose interest is afterwards put an end to by *A.* before any alteration is made in the composition, *A.* cannot determine it without a six months notice.

If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on 2 & 3 Ed. 6. c. 13., as the right to the tithe vested in *A.* immediately on severance.

Evidence that the parishioners have treated with the proprietor for a composition is not alone sufficient to establish his possession of the tithes in an action on the Statute.

Quare, Whether if one only of two joint-tenants execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out?

founded,

founded, and which were reserved by the Lord Chief Justice for the opinion of the Court, was as follows :

The ancestors of the late *Stephen Jermyn* having been leesees under the Dean and Chapter of *Saint Paul's* of the tithes of the parish of *Tottenham*, about sixty years ago leased them to one *Howard*, who held them for thirty years. On the 28th of October 1747 *Stephen Jermyn* was found lunatic ; after which one *Lambly* became lesee under him, and on 30th April 1781 obtained a new lease for seven years from *Edward Tyfon* the then committee of *Stephen Jermyn*, after the expiration of which he held over until the year 1798. In March 1796 *Stephen Jermyn* died, upon which *Harriet Eyre* and *Margaret Udney* the next of kin took out administration. In May 1796 the Dean and Chapter of *Saint Paul's* granted a new lease of the tithes to *Harriet Eyre* and *Margaret Udney* for twenty-one years on their surrender of the old one. From them *Lambly* received notice, dated the 30th September 1797, to quit at *Lady-day* 1798, with which he complied, and an assignment of their lease was executed to one *Sperling* on 7th December 1797. *Sperling* executed a lease of the tithes to the present Plaintiff, dated the 15th June 1798, to hold the same for seven years from the 25th March preceding.

During all the time that *Howard* and *Lambly* were tenants to the *Jermyn* family the same composition was paid to them by the occupiers of lands in the parish, and *Lambly* was expressly forbid by those under whom he held to make any alteration therein. *Sperling* having determined to raise the composition, gave a general notice to the parish in March 1798 that he was willing to treat with the landholders. In consequence of this a meeting was held by them, at which the terms proposed by *Sperling* were not acceded to.

In the case of *Smith*, that which was the subject of tithe was severed before, though not carried away until after the execution of the lease to him. The case of *Tuck* the first Defendant was also differed from the others by the circumstance of the Plaintiff's failing to prove the execution of the assignment to *Sperling* by *Harriet Eyre* jointly with *Margaret Udney* ; and it appeared that *Tuck* was not present at the meeting of the parishioners. Upon the whole therefore the objections as applying in the different cases, were ; 1st, That as the Plaintiff claimed under *Sperling*, to whom the assignment of the lease from the Dean and Chapter of *Saint Paul's* had been executed by *Margaret Udney* only, he had not

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not shewn a good title to support the action. 2dly, That a sufficient notice to determine the composition had not been given to the Defendants. 3dly, That the Plaintiff was not entitled to recover, as the tithe vested in *Sperling* immediately on severance.

A rule *Nisi* having been obtained for setting aside the several verdicts which had been found for the Plaintiff, and entering nonsuits in all the causes,

Shepherd Serjt. now shewed cause. In answer to the first objection, it may be contended that this action being founded on a tort, it is not necessary for the Plaintiff to make out his title, but that he may recover if he merely shew possession. It was so held in *Wheeler v. Heydon*, Cro. Jac. 328. In March 1798, *Sperling* gave notice to the parishioners, that he was willing to enter into a composition for tithes, in consequence of which a meeting was held, and at that meeting the only question in dispute was the amount of the composition to be paid; the right to the tithes was acknowledged to be in *Sperling*. Both in *Selwyn v. Baldy*, and *Hartridge v. Gibbs*, Sussex Affizes 1682, Bull. N. P. 188. edit. 2. it was holden sufficient by *Pemberton Ch. J.* for the Plaintiffs in actions on the Statute of Edw. 6. to prove their receipt of tithes from the other farmers in the parish in order to entitle them to recover against the Defendants. Proof of an agreement to pay a composition comes within the same principle. As to the second objection, it is to be observed that the case of *Hewitt and others v. Adams*, Dom. Proc. April 19th, 1782 (a), by which the necessity of a six months' notice to determine a composition of tithes was established, proceeded on the analogy between the occupiers of lands paying a composition, and tenants of lands holding from year to year. Now if *A.* let lands to *B.* for a term of years, and *B.* underlet to *C.* from year to year, *A.* will be entitled to enter upon the lands at the expiration of *B.*'s term without giving notice to *C.* So if *A.* let lands to *B.* at Michaelmas to hold from year to year, and *B.* underlet the same to *C.* at *Lady-day* to hold in the same manner, it will be sufficient if *A.* give notice to *B.* at *Lady-day* to quit at the Michaelmas following, without regarding the sub-contract between him and *C.* In the present case *Lambly* is to be considered as tenant to the *Jermyn* family from year to year, and the occupiers of the lands from whom he received the composition as his undertenants holding in the same manner.

(a) Vid. *Rayner on Tithes*, 992.

The notice therefore which was given to *Lambly* by the representatives of *Stephen Jermyn* must be sufficient to entitle them, and those who claim under them, to take the tithes in kind of the occupier of the lands. If this be not so, and the composition taken by *Lambly* is to bind the *Jermyns* or those who claim under them, it may equally be contended that it shall bind the Dean and Chapter of *Saint Paul's* who were the original lessors. With regard to the third objection, the words of the Statute are, that no person shall "take or carry away any such or like tithes &c. under the pain of forfeiture of treble value of the tithes so taken or carried away." The right of action therefore does not accrue until the tithes have been carried away: and though the tithes in question may have vested in *Sperling* upon severance, yet the lease to *Wyburd* was executed previous to the time when they were carried away; by that lease all the tithes in the parish of *Tottenham* to which *Sperling* was entitled, in which must be included the tithes in question, vested in *Wyburd*; consequently the latter was entitled to those tithes at the time when the wrong was committed. If however it should be thought upon general grounds that a lease of tithes will not convey such tithes as are actually severed at the time of its execution, it will be sufficient in this case to advert to the *habeendum* by which the lease is made to take effect from the 25th day of *March* preceding the date.

Le Blanc Serjt. contra. First, Admitting that it would be sufficient for the Plaintiff to have proved peaceable enjoyment of the tithes without establishing any other title, yet it was not in his power to support his claim by evidence of enjoyment, since *Sperling* had never received any tithes, or come to any composition. Secondly, A certain composition having existed in the parish of *Tottenham* without alteration, as far back as the evidence went, the Court will infer that it was made not by *Lambly* but by the Dean and Chapter of *Saint Paul's*, or by the *Jermyn* family from whom the Plaintiff derives his title. Now if a rector having made a composition lease tithes, and the lessee make no alteration in the composition, when the tithes revert to the rector the occupiers of land will continue to hold under the composition originally made by the rector, and consequently will be entitled to notice before he can take the tithes in kind. The rules respecting notice to determine a composition are governed by the analogy to the notice to quit. Thus if the *Jermyns*, having let land to *A.* from *Michaelmas* to *Michaelmas*, had granted a lease

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at *Lady-day* to *B.* for a term of years and *A.* had continued to pay rent to *B.* till the expiration of his term, *A.* would again be tenant from year to year to the *Jermyns*, and would be entitled to notice six months before *Michaelmas*. For though *B.* might have put an end to the tenancy during his term, yet not having done so, it continues as at first created: if it were not so, that which was originally taken as a tenancy from year to year beginning at *Michaelmas*, would be put an end to at *Lady-day*. The case of *Hewitt and others v. Adams* is decisive of this point. Thirdly, The Statute of *Edw. 6.* being made for the protection of persons in possession of tithes, the Plaintiff cannot maintain this action against the Defendant *Smith*. Immediately on severance the right to the tithes vested in *Sperling*, and *Smith* could only have justified carrying them away under a composition from him. If *Sperling* had been a spiritual rector instead of a lay impropriator, and had died after the severance of these tithes, they would have passed to his executors, and not to his successor; *Sperling* therefore was the person injured by the tithes being carried away. The *habendum* in the lease being from the 25th of *March*, has reference to nothing but the period from which the grantee is to hold, in order to ascertain the time when the lease is to expire, viz. in seven years from the 25th of *March*. If it were held to vest any title previous to the execution of the lease, it might be so framed that a lease for twenty-one years should give a right to tithes accrued fourteen years before.

EYRE Ch. J. On the first of the objections raised, and which applies to the case of *Tuck*, I have no difficulty, being of opinion that the verdict must be set aside and a nonsuit be entered on the ground of the Plaintiff's having failed to make out his title, and not having proved himself to be in possession of the tithes. It was admitted on his part, that he must at least shew himself to be in possession; and I am not prepared to agree that because possession unaccompanied with other circumstances will be a sufficient title, that therefore possession traced back by the Plaintiff himself to that which turned out to be no title, will equally avail. The case is altered where the Plaintiff proves his own bad title and thereby shews that to be a wrongful possession, which would otherwise have been good *prima facie* evidence to support his claim. However I only mean to state my difficulty on that point, not to give a precise opinion upon it, as the case cited from *Croke* seems to establish a contrary doctrine. But I am of opinion that this Plaintiff was not in possession, holding as I do that nothing will place

place a man in possession but a good title, which will draw to it the possession, or the actual receipt of tithes, or that which is equivalent to receipt of tithes, *viz.* a composition. My Brother *Shepherd* argued, that the receipt of tithes, like the receipt of rent and profits, amounted to possession. Actual use and enjoyment does so I admit; but he was obliged to contend from thence that an agreement for a composition was equal to a receipt, and then to go one step further, and insist that a conversation tending towards an agreement though it ended in a disagreement was equal in effect to an agreement. By this chain of reasoning he endeavoured to prove that the Plaintiff was in possession. His title however must depend upon his having or not having a lease; here he had only a lease for a moiety and therefore was not in possession and cannot maintain this action.

With regard to the question of notice, which applies to all these causes, I have the more difficulty in speaking upon it, as I feel myself under the dominion of old prejudices. The judgment of the House of Lords which has been alluded to, was a reversal of a judgment given by the Court of Exchequer, and in which I concurred. I am to presume that the judgment of the House of Lords was right, but I am not master of the principles on which it proceeded. Tithes cannot in my opinion be well compared to land for any purpose, but particularly for the purpose of connecting a composition with the inheritance. It appears to me that the doctrine of binding the landlord by the interest of the tenant from year to year was founded on the distribution of land into a variety of interests, as that of the tenant and the reversioner, whereas it will not be found to apply to tithes so distinctly as to justify our adopting the same rules as are capable of being adopted with respect to land. In the case of *Hewitt and others v. Adams* the Defendants insisted in the Exchequer that they were not at all bound to pay the tithes demanded, and we thought that where a Defendant claims to withhold tithe adversely, all idea of composition must be put out of the case. The analogy between land and tithe does not appear satisfactory to me. Land is either taken on a holding from *Lady-day*, or from *Michaelmas*, or from some other time, and then notice to quit must be given accordingly. But if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with a relation to the manure and cultivation of the land.

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land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself accordingly as he is to pay a composition or to pay in kind. I have great difficulty therefore in understanding on what ground a notice is necessary in the case of tithes, and I cannot at all comprehend how the owners of the land can be considered parties to a composition made with the occupiers of the land. Tithe in kind is the thing demised; the composition therefore begins with the interest of the tenant, is governed by that interest and must I should think end with it. It has been argued that there may be a connection between the title of inheritance to the tithes and the composition; if there can be, I submit; it may be a necessary consequence of that judgment, the principles of which I do not understand. As some of my Brothers concurred in that judgment, they will probably state on what ground it is, that a composition may be extended to the case of a new tenant, claiming on the determination of the interest of a former tenant.

On the last point there can be no doubt. The *habendum* of the Plaintiff's lease can only be considered as marking the duration of his interest, and its operation as a grant is merely prospective. That lease only vested in the Plaintiff a right to the tithe which should accrue from the time of the grant. Now the title to the tithe in question arose immediately on the severance of the titheable matter from the land. Is it not clear that if a rector dies after the severance of the tithe and before its separation, and a new rector comes in, that the right to the tithe is in the old rector? The law gives to the new rector in that case all that the grant gave to the new lessee in this. *Sperling* therefore being entitled to these tithes at the time of the severance and the person to complain if they were carried away, this Plaintiff has no ground of action against *Smith* in that view of the case.

BULLER J. My opinion will be principally founded on the two last points. On the first my mind still fluctuates. It has been contended that for want of evidence to establish the joint execution of the deed of assignment by the two persons who took out administration, the Plaintiff cannot recover against *Tuck*. But this is the case of a tort, and I am not quite satisfied that in such a case, if the Plaintiff declare as solely entitled and prove himself to be entitled to a moiety only, he may not recover for that moiety. It was so held in the case of *Nelthorpe and Farrington v. Dorrington*,

Dorrington, 2 *Lev.* 113. However, were I to rely on this point much, I should wish for further consideration, before I came to any conclusion. (a)

The second point appears to me to have been fully settled by the decision in the House of Lords. That decision was, that the same notice must be given to determine a composition, as must be given to a tenant of land holding from year to year. The other point alluded to by my Lord Chief Justice was also raised in that case. The landholders contended in the first place, that they were not obliged to pay the tithe claimed; and 2dly, that if they were, the Plaintiff was not entitled to recover because there had been a previous composition, the notice to determine which was not sufficient. There was a doubt on the Woolfack at that time whether both or only one or which of these questions should be put to the Judges. At last the question put was whether the notice given was sufficient to determine the composition, and the Judges were unanimously of opinion that it was not, and said expressly that a notice to determine a composition for tithe ought to be given with analogy to the notice ³ *Campb.* 75. given in a holding of land. By that decision we are bound; nor do I think any of the difficulties it has been supposed likely to produce will ever occur. It has been argued that if the Plaintiff, as deriving title from the *Jermyn* family, is bound by this composition, the *Dean and Chapter of St. Paul's* will also be bound by it. That conclusion however is questionable and may or may not be true according to the circumstances. If the interest of the lessee under the *Dean and Chapter* with whom the composition was made expire, the *Dean and Chapter* will not be bound. But if a lease be granted for a long term of years and the *Dean and Chapter* take an assignment of it, though as to many purposes that will operate as a surrender, yet with regard to the interest of third persons it will not. All depends on the single question whether there be a continuance of that interest under which the composition was first created? If that continues, the composition continues; if that be at an end, the composition is at an end also. It has been said that there may be a difference between a composition with the owner and a composition with the occupier of the land. If however the interest of the occupier ceases, the composition made with him, unless under particular circumstances, will be at an end. But no question of

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(a) *Vide Scott v. Godwin, ante*, p. 67. and the cases cited therein.

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that kind arises here, for it does not appear but that the occupiers in all the stages of the case were the same. The difficulty would be if we were to suppose a composition to take place from *Michaelmas* with a tenant who is in on a *Lady-day* bargain. In that case the composition would be either during the interest of the tenant or from year to year generally. If the former, notice must be given for *Lady-day*; if the latter, a question might be raised whether the composition should not continue to the end of the year, though the interest of the tenant ceased on the expiration of his lease. That may be a nice question, but it does not arise in this case. There may be difficulties in point of convenience as to the time at which a composition shall commence; but those difficulties are for the consideration of the parties when they make their agreement. On the facts of the present case the composition must be taken to be continuing, inasmuch as the Plaintiff claims under those persons with whom it appears to have been made.

The last point has been fully and ably stated by my Lord Chief Justice, and I entirely concur with him.

HEATH J. The objection to the Plaintiff's recovery, that there was no notice to determine the composition, must prevail, because the title under which he claims is derived from *Sperling*, in whose time the composition existed and has not been dissolved by the parties. In the House of Lords the analogy between land and tithes was considered, and the opinion of the Judges was founded on the inconvenience which the occupiers of lands must sustain, if a composition could be put an end to without notice. It was considered that by notice they would be enabled to cultivate their lands in such a way as would best answer to them when called upon to pay tithes in kind, and that it would be very unjust to deprive them of this advantage. As to the question whether this Plaintiff can recover when one only of two joint-tenants has executed the lease, I wish to give no opinion, as my Brother, *Buller* has cited a case in favour of the Plaintiff.

ROOKE J. It appears from the facts of this case that as far back as the evidence went, tithes had never been set out in the parish of *Tottenham*. It is to be wished therefore that these Defendants should not be liable to actions for not doing that which never appears to have been done within the parish: and in point of law I think that they are not liable. As the leesees of the tithes under the *Jermyn* family were desired by them not to raise the compo-

composition, it must be considered as having been made with that family. Now Mrs. *Eyre* and Mrs. *Udney* being the representatives of that family, may by implication be considered as having also desired that the composition should not be raised. And though they might have retracted the intimation originally given, yet not having done so, the composition must remain in force till notice be given to the landholders of an intention to put an end to it. The occupier may be induced by notice to alter the course of husbandry, and it would be hard to make him liable in a penal action where that notice has been withheld. On the principles of the decision in the House of Lords, and on the general justice of the case, I think a nonsuit should be entered.

With respect to the objection, that the assignment of the lease was executed by one only of two joint-tenants, it strikes me that it would be hard to allow the law as laid down in the case in *Levins* to prevail: since it would be calling on the Defendant to plead in abatement, or be liable to two more actions.

On the third point I entirely concur with the rest of the Court: the right to the tithes accrued immediately on severance, and at the time when the lease was executed there was nothing but a possibility of action in case they should not be set forth, which possibility could not be assigned.

Rule absolute.

JELFS v. BALLARD.

June 10th.
3 B&F. 4^o Full.
187.

INDEBITATUS *Affump't.* Plea. Bankruptcy and certificate. This cause came on before Buller J. at the Westminster Sittings in this term, when it appeared that the Defendant had formerly been a bankrupt and obtained his certificate; that a second commission issued against him on the 13th of April 1798, under which he also obtained his certificate; that the cause of action accrued previous to the second bankruptcy, but that under his last commission no dividend had as yet been declared. This last fact was proved by one of the assignees to the commission, who was called by the Plaintiff, and who stated that the debts proved

An action against a bankrupt, who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 Geo. 4,

a. 30. f. 37. is elapsed, if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees that the bankrupt will be able to pay 1s. in the pound.

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v.
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under the commission amounted to 1100*l.*; that effects of the bankrupt had been sold for 480*l.*, and that there was also a freehold estate, but from the incumbrances upon it he did not think it was of any value, and was upon the whole of opinion that the bankrupt would not pay 15*s.* in the pound; but that no dividend had been made. The jury found a verdict for the Plaintiff.

Sellon Serjt. now moved for a rule *Nisi* for setting aside this verdict and entering a nonsuit; and contended, 1st, that the Defendants not having paid 15*s.* in the pound under his second commission, being the only ground on which the Plaintiff could support his action, it lay upon him to prove that fact and thereby deprive the Defendant of the benefit of his certificate, and cited *Gill v. Scrivens*, 7 Term Rep. 27. where it was held necessary to aver it in a *Scire Facias*. 2dly, That the evidence which was produced to shew that the Defendant had not paid 15*s.* in the pound was not sufficient, but on the contrary proved that this action was commenced prematurely, submitting that as there were still effects in the hands of the assignees, and the amount of the property undisposed of was uncertain, the action ought not to have been brought until a dividend had been made; that by 5 Geo. 2. c. 30. s. 37. the assignees are directed to make the second dividend in eighteen months, whereas in this case the period allowed by the act had not elapsed, and therefore till that time it could not be ascertained whether the bankrupt would pay 15*s.* in the pound or not. He admitted that if it had been proved that the bankrupt's estate was so insolvent as to allow of no dividend, the action might in that case have been supported.

BULLER. J. (*absente* EYRE Ch. J.) The case referred to as decided in the King's Bench is good law; but that case does not shew on whom the proof of non-payment of the 15*s.* in the pound lies. The Plaintiff must state in his *Scire Facias* every thing that entitles him to recover; but it is a very different question what is to be proved by one party and what by the other. But supposing the *onus probandi* to lie on the Plaintiff, still the evidence which was given was at least presumptive evidence that the bankrupt will not pay 15*s.* in the pound, and not having been contradicted by the Defendant it must be held conclusive.

*8 B&C Pult
187.*

HEATH J. It is a common thing in actions on the game-laws for the Plaintiff in his declaration to negative all the qualifications, which would exempt the Defendant from the penalties of

those laws, but it lies on the Defendant to prove that he comes within any of them. The payment of 15s. in the pound is the condition of the bankrupt's discharge.

ROCKE J. Of the same opinion.

Sellon took nothing by his motion.

1799.

JELPS
v.
BALLARD.

**ELLIS and Wife, Executor and Executrix, v. GOVEY
Executor.**

June 11th.
2 Bo*f.* & Pull.
336.
3 Bo*f.* & Pull.
171.

A replication taking issue on a plea of payment to debt on an annuity bond must be signed by a Serjeant.

DEBT on bond conditioned for the payment of an annuity to *M. Shurmer* deceased, during her life. Pleas: 1st, Payment of the annuity to *M. Shurmer* up to the time of her death; 2dly, Payment of all arrears of the annuity due in the life-time of *M. Shurmer* to the Plaintiffs since her death. The Plaintiffs, after protesting in their replication against the payments as alleged in the pleas, averred twenty years arrears, amounting to 80*l.*, to be due and unpaid, and concluded to the country. This replication having been put in without the signature of a Serjeant, judgment of *Nonpros* was signed. To set aside this judgment for irregularity a rule *Nisi* was obtained on a former day, and *Shepherd* Serjt. in support of that rule now cited *Hubert v. Ld. Weymouth*, 2 Bl. 816. where it was held that a replication of *Nul tiel record* need not be signed by a Serjeant, notwithstanding the case of *Simpson v. Neale*, 2 Wilf. 74. in which a contrary rule had been laid down.

Cockell Serjt. contra, was stopped by the Court, who (*absente* *ETRE* Ch. J.) said; This point must be governed by the practice of the Court; and indeed as far as reason is concerned it seems right that this replication should be signed. Much may depend on the manner of taking issue; it is material that it should be so taken as to decide the merits. Where the plea is signed by a Serjeant, the replication should be signed also; to this rule a *filimilit* is an exception, for no judgment is required in merely joining issue.

However on payment of costs the Court made

The rule absolute.

In this term Mr. Justice ASHHURST having resigned his seat in the Court of King's Bench, was succeeded therein by SIMON LE BLANC Esq. one of His Majesty's Serjeants at Law, who was knighted.

CASES IN TRINITY TERM, &c.

On the last day of this term JOHN LENS of *Lincoln's-Inn* and JOHN BAYLEY of the *Middle Temple*, Esquires, were called to the honourable degree of Serjeant at Law, and gave rings with this motto,

“ *Libertas sub rege pio.*”

THE END OF TRINITY TERM.

Shortly after the close of this term, at *Ruscombe* his seat in *Berkshire*, died, Sir James Eyre Knight, Lord Chief Justice of this Court. *De cuius laude, neque hic locus est ut multa dicantur, neque plura tamen dici possunt quam populus Romanus memorat retinet.*

GWY42

C A S E S

1796.

ARGUED AND DETERMINED

IN

THE COURTS OF COMMON PLEAS

AND

EXCHEQUER CHAMBER;

AND

IN THE HOUSE OF LORDS

IN

Easter Term,

In the Thirty-sixth Year of the Reign of GEORGE III.

The following cases now presented to the Public, as a conclusion to the First Volume of these Reports, were determined in the year which intervened between the completion of Mr. H. Blackstone's Reports, and the commencement of this work. The Reporters having been favored with the notes taken during that period by Mr. A. Moore with a view to publication, have bestowed their utmost attention in digesting and arranging them; conscious at the same time how much better the task might have been performed by the same hand by which it was begun.

(In the *Exchequer-Chamber.*)

TARLETON and Others v. STANIFORTH and Others; April 20th.
In Error.

JUDGMENT in this case having been given for the Defendant
in the Court of King's Bench, (See 5 Term Rep. 695.) the
Plaintiffs brought their writ of error in this court.

Assured agree to pay the premium half yearly, "as long as the insurers should agree to accept the same" within 15 days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid; held that the insurers were not liable though the assured tendered the premium before the end of the 15 days, but after the loss.

In a policy of insurance against loss by fire from half a year to half a year, i.e.

H H 4

The

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 TARLETON
 v.
 STANIFORTH.

The case was argued this day by *Chambre* for the Plaintiffs in error, and *Wood* for the Defendants, when the judgment of the *King's Bench* was affirmed.

(In the *Exchequer-Chamber*.)

April 20th.

TURNER and Others v. HAWKINS and Others; In Error.

A. declared in case against *B.* for sinking his boat, and after averring a non-feasance in *B.* as the cause, stated him to have acted with great force and violence in accomplishing the injury; *A.* recovered, and on error brought because the action should have been trespass not case, and because the two actions were mixed, the Court referred the concluding expressions to the non-feasance first stated, and held the declaration sufficient to support the judgment.

“*Nottinghamshire* BE it remembered that on Wednesday next &c. to wit. before our Lord the King at Westminster come the Plaintiffs by S.B. their attorney and bring into the court of our said Lord the King before the King himself now here their certain bill against the Defendants being in the custody &c. of a plea of trespass on the case and there are pledges &c. which said bill follows in these words; *Nottinghamshire* to wit, The Plaintiffs complain of the Defendants being in the custody &c. For that whereas the Plaintiffs before and at the time of the grievance hereinafter committed to wit on &c. were lawfully possessed of a certain boat or vessel then navigating and floating on the river Trent being a public navigable river and King's common highway and then and there drawn and hawled on the said river by certain cattle to wit 10 horses then and there affixed and fastened to the same and hawling the same on the said river and of divers goods &c. in the said boat &c. to wit at &c. and which said boat or vessel was then and there under the care and guidance of certain of their servants And whereas also the Defendants on the same day and year aforesaid were possessed of a certain other boat or vessel then floating and navigating on the said river drawn and hawled by certain cattle to wit 10 horses then and there affixed and fastened by certain ropes or hawling-lines to and hawling the same upon the said river to wit at &c. and which said last mentioned boat or vessel was then and there under the care and guidance of certain servants of the Defendants And whereas before and at the time of the grievance hereinafter mentioned to wit on &c. at &c. the said boat or vessel of the Plaintiffs had overtaken and had occasion to pass by the said boat or vessel of the Defendants on which occasion the Defendants by their said servants so conducting and navigating their said boat or vessel ought then and there to have slackened the said ropes or lines with which the said cattle were so fastened to their said boat or vessel so as to permit the said boat

boat or vessel of the Plaintiffs to pass over the same whereof they then and there had notice, Yet the Defendants by their said servants not regarding their duty in this behalf but contriving and wrongfully intending to hurt injure and prejudice the Plaintiffs in this behalf did not nor would slacken the said ropes or lines or permit or suffer the said boat or vessel of the Plaintiffs to pass the said boat or vessel of them the Defendants but on the contrary thereof then and there to wit on &c. at &c. by their said servants in that behalf wrongfully unlawfully and injuriously drove on the said cattle hawling and drawing their said boat or vessel with great force and violence and thereby forced and drove the said boat or vessel of them the Defendants against the said boat or vessel of the Plaintiffs by reason whereof and by and through the straining and pressure of the said ropes or lines thereby and forcing the said boat or vessel against the said boat or vessel of the Plaintiffs the said boat or vessel with the said goods &c. on board her as aforesaid was driven and forced across the stream there and sunk and the said boat or vessel was not only greatly damaged and spoiled thereby but the said goods &c. were spoiled &c. and the Plaintiffs lost the benefit of the voyage &c. and were obliged to spend a large sum of money &c. and also divers servants and horses of the Plaintiffs were for a long time out of employ and of no use to the Plaintiffs to wit at &c."

The 2d count stated, that the Defendants "ought to have permitted and suffered the said boat or vessel of the Plaintiffs to pass the said boat or vessel of the Defendants" but that they did not, omitting the circumstances of slackening the rope, but being in all other respects similar to the 1st count.

The 2d and 3d counts were for negligently and ignorantly conducting the vessel.

Plea, Not guilty. Verdict for the Plaintiffs and judgment in the *King's Bench* accordingly.

The Defendants assigned for errors in this court, "that by the record aforesaid it appears that the Plaintiffs have in the 1st count of their said declaration complained against the Defendants as if the whole of the said cause of action in that count mentioned had been a mere consequential injury, whereas so much of the cause of action in that count mentioned as arose from the driving on the said cattle in that count mentioned with great force and violence and thereby forcing and driving the said boat or vessel of them the Defendants against the said boat or vessel of the Plaintiffs

appears

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appears to have been a direct and immediate trespass and injury committed by the said defendants on the property of the said Plaintiffs." The same as to the 2d count. And "that the Plaintiffs have complained against the Defendants for the whole of the causes of action mentioned in the said declaration *as in a plea of trespass on the case* whereas for so much of the cause of action in the said declaration mentioned as arose from the said driving on the said cattle in the 1st count of the said declaration mentioned with great force and violence and thereby driving and forcing the said boat or vessel of the Defendants against the said boat or vessel of the Plaintiffs, they ought to have complained against the Defendants *in a plea of trespass vi et armis*" The same as the 2d count. And "that in the said declaration there are comprehended and included causes of action different and distinct in their natures to wit causes of action founded on immediate direct and forcible injuries and trespasses and causes of action founded on injuries that are merely consequential; which causes of action are incompatible with each other and ought not to be joined in the same declaration."

Joinder in error.

Wood for the Plaintiffs in error. The errors assigned apply to the 1st and 2d counts only, in which the breaches stated are clear acts of trespass. The distinction between the actions of trespass *vi et armis* and trespass on the case, is perfectly settled; "if the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action on the case is the proper remedy." *Per Lord Kenyon in Day v. Edwards*, 5 Term Rep. 649. The injury here complained of was the immediate act of the Defendants' servants; no negligence is stated in either of the two first counts. In *Day v. Edwards* an action on the case being brought against the Defendant for driving his cart against the Plaintiff's carriage, it was held bad on demurrer; and the only difference between that case and the present, consists in the injury having been there committed by the Defendant himself, whereas here it was committed by the Defendants' servants. But this difference in circumstance affords no distinction in principle; *Savignac v. Roome*, 6 Term Rep. 125. The case of *Tripe and Dyer v. Potter*, before Yates J. at Exeter 1767, cited 6 Term Rep. 128. is strongly analogous to the present; there the Plaintiff having declared in case against the Defendant for wilfully rowing his boat against the Plaintiff's net,

whereby

whereby the Plaintiff's net was sunk and the Plaintiff prevented from drawing it, &c. was nonsuited. And the principles laid down by Lord Chief Justice *De Grey* in *Scott v. Shepherd*, 2 Bl. 899, clearly establish that if the act of the Defendant be immediately injurious to the Plaintiff, though the injury arise from accident, or the act which occasions it be lawful, yet trespass is the only remedy.

Wigley for the Defendants in error. Whatever might have been the event of this case on a demurrer, the Court will not now presume any thing after verdict which can defeat the Plaintiffs' judgment. *Slater v. Baker and another*, 2 Wilf. 359. It appears that in some cases either trespass or case will lie. Thus in *Pitts v. Ginance and another*, 1 Salk. 10. where it was objected that case by the master did not lie for entering and detaining a ship, but trespass only, *Holt Ch. Just.* held that either action might have been maintained. In *Scott v. Shepherd* it was said by *Blackstone* J. that every action of trespass with a *per quod* includes an action on the case; and that a man may bring trespass for the immediate injury and subjoin a *per quod* for the consequential damages, or case for the consequential damages and pass over the immediate injury; and for this he cited 11 Mod. 180. So in *Slade's case*, 4 Co. 94. b. a case is put where a man may have "a general writ of trespass or an action upon his case," and in Hob. 180. and Sty. 99. the same doctrine is laid down. It was thrown out in argument in *Savignac v. Roome*, that the master is not answerable for the wilful wrong of his servant, and for this was cited *Jones v. Hart*, 2 Salk. 441. and the marginal abstract there; if however the act whether wilful or not be done in the master's service, the master is answerable. 1 Ld. Raym. 265. 2 Term Rep. 154. It was indeed intimated in *Sunderon v. Baker and another*, 2 Black. 832. 3 Wilf. 309. S. C. that there should be a recognition of the servant's act by the master in order to fix the latter; but that is now held unnecessary (a). Had this appeared at the trial to have been an act altogether unauthorized by the Defendants, or a clear trespass, in either case the Plaintiffs would have been nonsuited, *Harward v. Bankes*, 2 Burr. 1113, and therefore the Court after verdict will suppose it to have been so proved as to support the judgment. Indeed in *Morley v. Gaisford*, 2 H. Bl. 443. the Court said it would be difficult to put a case where a master could be considered as a trespasser for the act of his servant, unless done by his command.

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(a) See *Bubb v. Scrimmer*, ante 404.

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Day v. Edwards was on demurrer, and in *Savignac v. Roome* the injury was stated to have been done *wilfully*, which was much pressed in argument. The present cause of action was a mere non-feasance, for the injury is averred to have arisen from not slackening the rope, in consequence of which the Plaintiffs' boat was sunk.

EYRE Ch. J. Undoubtedly we ought to endeavour to preserve the distinction of actions, and therefore if it appear upon the pleadings that actions of a different nature have been mixed, that is a sufficient ground for arresting the judgment. That point however ought to be very clearly made out, where the objection is taken after verdict. Now if we read this declaration with that favour to which it is intitled after verdict, the judgment may well be supported without reference to all that learning which has been cited in its support. The cause of all the mischief which has happened in this case, was the Defendants' servants not slackening the rope as it was their duty to have done, and in consequence of which neglect the horses went on in a way injurious to the Plaintiffs. It is therefore extremely clear that the cause of action was a non-feasance, and it is fair to infer that it was not intended to charge the Defendants with *wilfully driving* their boat against that of the Plaintiffs. All the circumstances alleged are referable to the non-feasance, which makes it a compleat action on the case. The injury is not laid to have been done *wilfully* but *wrongfully*, which is applicable to case, and indeed to make it trespass, we must entirely overlook the non-feasance. This being so, we may pass over all the learning which has been collected, and decide the case on that ground on which the whole rests, viz. a fair understanding of the declaration, referring the different expressions to that first cause to which they are justly referable.

*Per Curiam,**Judgment affirmed. (a)*

(a) The same in principle is the case of *Qule and another v. Barnes and others*, 8 Term Rep. 188. There the declaration in case having alleged negligence and unskillfulness in the Defendants' management of a ship, by reason whereof she ran foul of the Plaintiffs' ship with great force and violence, and damaged her, the Court of K. B. on a motion in arrest of judgment, on the ground of the action having been case when it ought to have been trespass, refused to imply any act wilfully done by the Defendants, and held the action well conceived.

CHAUNT v. SMART.

April 25th.

SHEPHERD Serjt. moved for an attachment against the Defendant for neglecting to deliver up a promissory note in pursuance of an order of *Nisi Prius*, which had been made a rule of Court, and served upon him with a demand of the note. There was some difficulty at first as to the manner in which the rule ought to be drawn up, the officers seeming to be of opinion, on the authority of *Townsend v. Baker, Barnes* 31, that the rule should be absolute in the first instance.

No rule for an attachment to be absolute in the first instance except for non-payment of costs upon the prothonotary's *allocatur*.

But *The Court* determined that a single authority was not sufficient to support that doctrine; that the party though willing might not be able to deliver up the note, as in case of fire; that where any excuse could be offered for disobedience to the rule, the party ought to be permitted to shew cause; that in future the practice of this Court should be conformable to that of the *King's Bench* (a), and the rule should be to shew cause why the attachment should not issue in all cases except of non-payment of costs on the Prothonotary's *allocatur*.

(a) *Tid's Pract. K. B.* 256.*Ex parte BENJAMIN LAWRENCE.*

April 26th.

CLAYTON Serjt. applied to the Court to discharge the petitioner out of the custody of the Warden of the *Fleet*, under the following circumstances. In 1784 the prisoner being then under confinement in *Gloucester* gaol for debt, was served with a *subpoena* issued out of *Chancery* at the suit of *G. Mayo*; in 1785 he was removed by *Habeas Corpus* to the *Fleet*, and his poverty disabling him from putting in any answer to *Mayo's* bill, a decree that the bill be taken *pro confesso* was obtained against him, on which he was regularly charged in custody for the contempt, and the fees amounting to near 5*l.* remained unpaid. On the 15th of September 1794 he was brought up at the Quarter Sessions for the City of *London*, in order to take the benefit of the insolvent act 34 Geo. 3. c. 69, but was remanded, it appearing in the copy of the causes wherewith he stood charged in custody, that he was detained by virtue of an attachment issued out of *Chancery*. Application was then made to the Court of *Chancery* to discharge him, which was refused *unless upon payment of the fees*. *Clayton* now

The Court of *Chancery* having refused to discharge a prisoner in custody for not putting in an answer *unless on payment of the fees*, he applied to *C. B.* to be discharged under the insolvent act 34 G. 3. c. 69, but was refused; his contempt not consisting in the non-payment of money.

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*Ex parte
LAWRENCE.*

now urged, that though he was in custody for a contempt in point of form, yet that he was in reality detained for the non-payment of the fees incurred by that contempt.

The Court however were of opinion that no redress could be obtained by the prisoner, but from the Court of Chancery; for that though on payment of his fees, that Court had offered to discharge him, yet his contempt did not consist in the *non-payment of money* (the term used in the 34 Geo. 3. c. 69.) and consequently that he was not entitled to be discharged under that act.

Clayton took nothing by his motion.

*April 26th.
2 Bef. & Pall.
370.*

A writ of error operates as a *superfedeas* from the time of the allowance, not from the time of service. Bail therefore must be put in within four days from the former period.

GRAVALL v. STIMPSON.

FINAL judgment was signed in this case, and a writ of error allowed on the 27th February; on the 1st of March the Defendant's attorney served the Plaintiff's attorney with the allowance of the writ of error; on the 3d of the same month the writ of *Fi. Fa.* was sued out upon the judgment; and on the 4th bail in error was put in, execution under the *Fi. Fa.* having been previously levied in the morning of the same day. To quash this *Fi. Fa.* for irregularity and have the money levied under it restored to the Defendant with costs, *Le Blanc Serjt.* on a former day obtained a rule *Nisi*: the question being whether a writ of error operates as a *superfedeas* from the time of its allowance, or from the time of serving the allowance on the party?

Shepherd Serjt. shewed cause. A writ of error is a *superfedeas* of execution from the time of its operative allowance, provided bail be regularly put in. *Lane v. Bacchus*, 2 Term Rep. 44. Service of the allowance is only material to bring the party into contempt if he afterwards proceed to execution. Bail therefore must be put in within four days after the time of the operative allowance. In *Jacques v. Nixon*, 1 Term Rep. 279. the allowance of the writ of error was served on the 31st of May, final judgment was signed and execution sued on the 14th of June, and within four days after that time bail was put in. This was held to be a *superfedeas*; which could not have been the case, if the time of service which was long before the judgment, had been the date of the operative allowance, for bail would not then have been put in within four days. The inconvenience of the contrary practice is a sufficient argument against it: for if the plaintiff in error were not compellable to put in bail, till within four days after service of

the allowance, he might wait for any length of time, till execution had been issued, and then harass the party by serving him with the allowance and putting in bail, by which the execution would be superseded.

Le Blanc in support of the rule. The case of *Jacques v. Nixon* is distinguishable from this; for there the writ of error was allowed, and the allowance served before final judgment, and bail was put in within four days after the judgment; but since bail could not possibly be put in until after judgment, and as the service and allowance were suspended till the judgment, and both began to take effect at that period at once, it cannot be collected from that case whether the operation of the writ of error as a *superfedeas* commenced from the allowance or the service.

EYRE Ch. J. This is a point extremely clear. The party has four days to put in bail after the allowance of the writ of error (a). It is indeed the practice to get the allowance of the writ of error previous to the judgment being signed; but that is an irregularity permitted for the convenience of the party, for the judgment in the action is the true foundation of the writ of error. The allowance therefore though previously obtained cannot be operative till judgment has been signed; and four days must then elapse before the party signing it can safely sue out execution. But if the writ of error be allowed after judgment has been signed, the party entitled cannot regularly sue out execution until four days after the allowance.

BULLER J. Two things are requisite to make a writ of error a *superfedeas* of execution: to wit, the allowance, and putting in bail. If the writ of error be allowed before judgment, the time of putting in bail runs from the judgment, if after judgment from the time of the allowance.

Per Curiam,

Rule discharged (b).

(a) That is after delivery of the writ to the clerk of the errors. *Reg. Mich. 28 Car. 2.* and it is from this delivery, not from the sealing, that the writ operates as a *superfedeas*. *Meriton v. Stephens,* Barnes 205. ed. 3. and *Sykes v. Dawson*, Barnes 209.

(b) For the practice on this subject see *Tidd's Pract. K. B.* 868, 869. ed. 1. 1100, 1101. ed. 2.

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GRAVALL
v.
SIMPSON.

2 *Br. & P. H.*
137.

FREEMAN v. JACKSON.

April 26th.

A n action having been commenced in Hilary Term last, the Defendant on the 18th of February obtained an order for a month's time to plead, and on the 17th of March another order for three weeks further time.

On

In an order to enlarge the time for pleading the first and last days are both reckoned inclusively.

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On the 7th of April the Plaintiff signed judgment for want of a plea.

Runnington Serjt. now moved for a rule to shew cause why the judgment should not be set aside for irregularity, contending that it had been signed upon the day on which the time to plead expired; and that though it had been the practice of the Court to consider both the days as inclusive, in computing the time under a rule to plead, yet that under an order to enlarge the time of pleading one of the days should be exclusive.

But the officers of the Court concurring with *Adair* Serjt. who opposed the motion, that the days were in both instances computed inclusively, the Court held the judgment to have been regularly signed. It was however set aside on terms for the purpose of letting in the merits.

On the next day *Runnington* endeavoured to revive the question by a similar motion, and was about to cite the case of *Kay* one &c. *Whitehead*, 2 H. Bl. 35. to shew that the judgment was irregularly signed: but was stopped by *Buller* J. (*absente Eyre* Ch. J. and *Heath* J.) who said, that as the judgment had been already set aside, the Court could not attend to the motion, whether right or wrong.

 April 27th.
 3 Bef. 15 P.M.
 244.

If the damages given by a verdict be reduced by an award under an order of *Nisi Prius* which has been made a rule of Court, the party is entitled to have the postea delivered to him without any application to the Court.

GRIMES v. NAISH.

SHEPHERD Serjt. moved, that the damages amounting to 100*l*. which had been found for the Plaintiff in this cause, should be reduced to 26*l*. pursuant to an award under an order of *Nisi Prius* which had been made a rule of Court, that the postea should be delivered to the Plaintiff, and that the judgment should be entered for the latter sum.

The Court were of opinion that the learned Serjeant should withdraw his motion, the Plaintiff under such circumstances being entitled to have the postea delivered to him without any application to the Court. (a)

(a) Vid. *Higginson v. Neffitt*, ante 97. where the Court gave leave to enter up the judgment without a rule to shew cause.

 April 27th.
 1 Term Rep.
 648.

The Court will not discharge a Defendant on a common appearance on the ground of infancy.

MADOX v. EDEN.

Cockell Serjt. moved to discharge the Defendant out of custody on entering a common appearance. The affidavit stated that

the

the action was brought on a promissory note given by the Defendant, who was under age:

But the Court were of opinion, that as his infancy could not unless pleaded (*a*) exonerate him from the debt, and as it was not certain as yet that he would plead it, it was no ground for the Court to discharge him out of custody.

Cockell took nothing by his motion.

(*a*) It should seem that this expression must not be confined to the Defendant's putting his infancy on record, but that it applies generally to his making it a defence; for in *Seaton v. Gilbert*, 2 *Lev.* 144. *Lord Hale* permitted infancy to be given in evidence on *non assumpsit*, and in *Darby v. Bousber*, 1 *Salk.* 279. *Treby Ch. J.*

1796.

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v.
EBEN.

TABRUM v. TENANT.

April 28th

THE Defendant having entered into a bond for the payment of a sum of money to this Plaintiff and one *Lightfoot*, which became forfeited, an action was commenced upon the bond, a *Capias ad respondendum* issued, and recognizance of bail taken at the suit of *Tabrum* alone. On discovery of the mistake an original was sued out in the joint names of *Tabrum* and *Lightfoot*, and an application was made to the Court to allow the *Capias ad respondendum* and recognizance of bail to be amended by the original by the insertion of *Lightfoot*'s name as a Co-plaintiff.

Le Blanc and *Marshall* Serjts. now shewed cause against a rule *Nisi* obtained for that purpose, and contended, that this if allowed would not be a correction of the proceedings in conformity to the writ by which they were commenced, but an adaptation of them to a new original, the foundation of a new action; and that it was not a clerical error, nor within the Statute of *Jeofails*: they insisted that the bail who had only made themselves responsible for the Defendant in the separate suit of *Tabrum*, could not without their consent be bound to discharge the joint demand of *Tabrum* and *Lightfoot*; and that possibly the same bail who were willing to keep the Defendant out of prison, knowing that the Plaintiff had misconceived his action and could not finally recover, would object to engage themselves when, by the correction of that error, they were likely to be damaged.

Shepherd Serjt. in support of the rule, urged that stronger instances of amendments had occurred, as where a new bill had been filed after judgment to amend a declaration; *Marshall v. Riggs*,

One obliges in a joint bnd having sued out a *Capias* against the obligor, and taken a recognizance of bail in his own name only, afterwards sued out an *Original* in the name of both obligors, and then applied to the Court to amend both the *Capias* and recognizance; the Court granted the former but refused the latter.

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2 Str. 1162. or writs of execution had been amended by the previous proceedings; *Hunt v. Kendrick*, 2 Bl. 836. *Larocque v. Wabrough*, 2 Term Rep. 737. and *Newnham v. Law*, 5 Term Rep. 577. He contended, that at least the Court would permit an amendment of the *Capias ad respondendum*, if not of the recognizance of bail, which would secure to the Plaintiffs the benefit of the Defendant's appearance; for that though the bail should be discharged, still the having put them in would amount to an appearance, as is the rule in cases where bail are discharged by the Plaintiff's declaring in a different county from that in which they are put in. (a)

Per Curiam. The recognizance cannot be amended, for the bail may not be charged but by their own consent. With respect to the *Capias* that may be amended by the consent of the Defendant, who will in that case be in as good a situation as he is at present; for if this amendment were refused, a declaration might be delivered at the suit of *Tabrūm*, and immediately afterwards a declaration by the bye at the suit of *Tabrūm and Lightfoot*.

Accordingly that part of the rule which related to the *Capias* was made absolute by consent (b); and that which related to the recognizance was discharged.

(a) *Vid. Yates v. Plastin*, 3 Lev. 235. defendant's consent? See *Davis v. Owen*,
 (b) Qu. Whether the Court would not ante 342.
 have amended the *Capias* without the De-

April 28th.

SYMONDS et Ux v. COBOURNE.

The Court cannot order an annuity bond to be delivered up to be cancelled for want of memorial pursuant to 17 Geo. 3. c. 26., though it be void by the 1st section of that act. *Quare, Whether in such a case they would stay proceedings on the bond?*

A RULE was obtained upon a former day, to shew cause why an annuity bond made to *Symonds*, by the Defendant *Cobourne* and another person, should not be delivered up to be cancelled, for want of a memorial, in pursuance of the annuity act. An action had been commenced on the bond by the Plaintiffs against the Defendant.

Le Blanc now shewed cause, insisting that by the first clause of the act the bond was merely void, and that the cases where the Court interfered by ordering deeds, &c. to be delivered up to be cancelled, were founded on the 4th section of the act. (a)

EYRE Ch. J. The motion should have been to stay proceedings: perhaps that might not have been granted, but the Defendant put to plead the circumstances. However, as no stay of proceedings is prayed by this motion, the rule must be discharged.

Per Curiam,

Rule discharged.

(a) See the form in which the rule was made absolute in *Dolmer v. Bernard*, 7 Term Rep. 253.; also *Ex parte Ansell*, ante 66, in the note.

1796.

CAPADOSE v. CODNOR.

April 30th.

TROVER for the ship *Castor and Pollux*. At the trial before Eyre Ch. J. it appeared that the ship having been built in the year 1790, was transferred by the builders to the present Defendant under the grand bill of sale, when a certificate of British registry was obtained by the Defendant for himself as owner and master, and several voyages in her were performed by him as such; that in 1791 the Defendant having had considerable dealings with G. Lempriere, a merchant in London, and being then indebted and likely to become more so to him, assigned the *Castor and Pollux* by way of security, and delivered possession of the grand bill of sale; that in the deed of assignment the certificate of the registry of the ship was truly and accurately recited in words at length, pursuant to the directions of 26 Geo. 3. c. 60. s. 17.; that on the 3d of April 1792 G. Lempriere, in consequence of some transactions by which he became indebted to the Plaintiff, executed to him an indenture, which after reciting the assignment from the Defendant, and the debt due from him to G. Lempriere as well as that from G. Lempriere to the Plaintiff, assigned G. Lempriere's interest in the ship to the latter, subject to redemption on payment of the money due on the 2d of July following; that in this assignment as in the former, the certificate of the ship's registry was truly and accurately set forth; that at this time the Defendant was on a voyage with the ship and acting as master, and that previous to his return G. Lempriere having become bankrupt, he refused (a) to deliver up the ship to the Plaintiff. The objection stated at the trial to the Plaintiff's recovery, was, that neither in the assignment to Lempriere nor in that to the Plaintiff was there any recital of such indorsement of the change of property made on the certificate of registry, as was originally required by 7 & 8 W. 3. c. 22. (b) and

(a) This was in consequence of an indemnity given him by the house of De Fioot and Co., to whom G. Lempriere was also indebted. On the Defendant's refusal the ship was arrested by admiralty process, at the suit of the Plaintiff; and in consequence the Defendant filed a bill in Chancery against the Plaintiff, the assignee of G. Lempriere, and De Fioot and Co. as amicable Defendants; on the hearing the Master of the

Rolls strongly inclined in favour of the present Plaintiff, but suggested the objection now made, and retained the bill for a year, in order that the question might be tried at law.

(b) The 21st sect. of 7 & 8 W. 3. c. 22. enacts that "in case there be any alteration of property in the same port, by the sale of one or more shares in any ship after registering thereof, such sale shall always be acknowledged."

The indorsements on the certificate of registry required by 7 & 8 W. 3. c. 22. and 26 Geo. 3. c. 60. s. 16. need not be recited in the deed of assignment of a ship under s. 17. of the latter act.

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and subsequently with some alterations by 26 Geo. 3. c. 60. s. 16. A verdict was found for the Plaintiff, with liberty to the Defendant to move to set it aside and have a verdict entered the other way.

Accordingly a rule *Nisi* for this purpose having been obtained, *Adair* and *Le Blanc* Serjts. shewed cause, and contended that the Legislature did not mean to make void assignments of this kind where a recital of the indorsement was omitted in the deed, since nothing to that effect appeared in the 26 Geo. 3. c. 60. s. 16. which regulates the form of the indorsement: that however the penalty of forfeiture enacted by 7 & 8 W. 3. may attach in cases where no indorsement is made, the sale itself is not avoided by 26 Geo. 3. probably in order that ships may be assigned by way of mortgage during the absence of the ship and master: that the subsequent statute 34 Geo. 3. c. 68. s. 15. (which could not affect this case, being passed after the transaction) makes all sales absolutely void which are not attended by an indorsement, and that this provision would be absurd had the same thing been necessary under the 26 Geo. 3.: that the Court would not extend the words of a statute in order to make void a security for the omission of something not required by that statute to be inserted; and that the indorsement could not be deemed part of the certificate, since it had not been made so by the act.

Cockell and *Shepherd* Serjts. contra argued, that the security was void for not reciting the indorsements on the certificate of registry: that the object of the Legislature in altering and extending the provisions of 7 & 8 Will. 3. was to prevent the pos-

" acknowledged by indorsement on the certificate of the register before two witnesses, " in order to prove that the entire property in such ship remains to some of the subjects of England, if any dispute arises concerning the same." The 26 Geo. 3. c. 60. s. 16. referring to the above provision as insufficient, enacts, " that besides the indorsement required by the said recited act there shall also be indorsed on the certificate of such registry before two witnesses, the town, place or parish where all and every person or persons to whom the property in any ship or vessel or any part thereof shall be so transferred shall reside; or if such person or persons usually reside in any country not under His Majesty's dominion, but in some British factory, the name of such factory; or if in any foreign town or city, not " being a member of some British factory, " the name of such town or city, and the names of the house or copartnership in Great Britain or Ireland, for or with whom such person is agent or partner; " and the person or persons to whom the property of such ship or vessel is transferred, or his or their agent shall also deliver a copy of such indorsement to the person authorised to make registry and grant certificates of registry, who is hereby required to cause an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry of such ship or vessel was obtained, and make a memorandum of it in the Book of Registers, and give notice of it to the commissioners of the customs in England and Scotland."

ability

sibility of any foreigner having a secret interest in the ship: that it was intended by the 17th section of 26 Geo. 3. c. 60. (a) that the bill of sale should correspond with the registry, and that they should be checks upon each other, which would cease to be the case, if the indorsement were omitted in the recital of the certificate: that the words of the 17th section include indorsement as well as certificate; for that as by the preceding section, an entry of the former is to be indorsed upon the affidavit, upon which the latter was obtained, the old certificate of registry, becomes in fact a new certificate, and ought as such to be recited in the deed of assignment; that the 17th section which enacts the recital of the certificate of registry, being subsequent to the other provisions relating to transfer of property, may be construed thus; "all these things are necessary to be done, and shall be recited;" that it is proper that the purchaser should see by the bill of sale whether the ship be liable to confiscation, which does not appear unless the indorsements as well as the certificate be recited; and that one of the objects of the act was, to provide against fraud in future transfers. They referred to *Rolleston v. Hibbert*, 3 Term Rep. 406. (b)

EYRE Ch. J. This is an important point, depending upon the construction of particular acts of parliament, which are the bulwarks of the commerce of this country and the great tower of our naval strength. The construction of those acts must be made on a full consideration of their letter and spirit taken together. If it were shewn to be essential to a compliance with the spirit of the statutes referred to, that the indorsement should be recited as a part of the certificate, that would go far to establish the necessity of such a recital. Let us see then how far the nature and extent of these legislative provisions serve to explain the clause on which this question principally turns. The object of these laws was, to confine the advantage of trading to the plantations to British subjects and to British-built ships. In order to prevent evasions, it was necessary that the public should have the means of ascertaining without difficulty who were the owners, who were the masters of the ships, and what particular ships were employed in that trade.

(a) Which enacts, "that when and so often as the property in any ship or vessel belonging to any of His Majesty's subjects shall be transferred to any other of His Majesty's subjects in whole or in part the certificate of the registry of such ship or vessel shall be truly and accurately recited in words at length in the bill or

"other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void to all intents and purposes."

(b) *Vid. etiam Hibbert v. Rolleston*, 3 Bro. Cbar. Cas. 572. *Rolleston v. Smith*, 4 Term Rep. 161. *Camden v. Anderson*, 5 Term Rep. 709. and *Westerell v. Dale*, 7 Term Rep. 306.

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But the transfer of ships from one owner to another was no other-wise interesting to government than to prevent their coming into the hands of foreigners. The 7 and 8 Will. 3. c. 22. s. 17. therefore directs that the name of every ship trading to the plantations, the port to which she belongs, the master's name, the kind of built, the burthen, the place where and the time when built, and the owner's name shall be registered upon oath, together with a declaration that no foreigner directly or indirectly hath any interest therein. By the 18th section a copy of the oath upon which the register is made is to be delivered to the master of the ship by way of certificate to prevent his being interrupted by confiscation; and by the 21st section of the same statute it is provided, that upon every alteration of property the sale shall be acknowledged by indorsement on the certificate, in order to prove, in case of dispute, that the entire property remains in *British* subjects. The 26 Geo. 3. c. 60. s. 16. goes beyond this, introducing a more circumstantial indorsement, and enacting that a copy of this indorsement shall be sent to the public officer authorised to grant certificates, who, after having made a memorandum of it himself, is to transmit it to the commissioners of the customs. By these means the real owner must be known both at the port and the Custom-house, which is a very important step towards preventing a secret conveyance to foreigners. It is indeed provided, that upon every transfer of the property of the ship, the certificate shall be recited in the bill of sale. But if it were also necessary under this provision to recite the indorsements made on such certificate, upon every successive transfer, it would be equally necessary to recite the indorsements made upon the several changes of masters, as directed by 26 Geo. 3. c. 60. s. 18. I am of opinion, however, that it is sufficient to send copies of the indorsements to the public offices, and that the certificate itself is enough to shew the owner. In this case there was no indorsement on the transfer to *Lempriere*, and it would be peculiarly hard upon the present Plaintiff to hold the assignment to him void because he did not require indorsements to be made in order to be recited. These parties chose to run the risk of confiscation: the certificate, such as it was at the time of the sale, was recited: and were it necessary to decide whether the want of indorsement upon the certificate made the assignment void, I should incline to think that it did not (a). Much has been said in favour of the policy of reciting

(a) By 34 Geo. 3. c. 68. s. 15. the form of the indorsement is altered, and all contracts for sale are now made absolutely void, unless such indorsement be duly made, and a copy thereof delivered to the person authorized to grant certificates.

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the indorsements, but I think it has not been shewn that it was made necessary by the provisions of 26 Geo. 3. c. 60.

BULLER J. It is not necessary to decide whether the want of indorsements avoids the assignment; for the question here is, Whether the bill of sale be insufficient because the indorsements are not recited therein? I think that the Legislature looked to the public interest only, as appears by all the provisions of the act, and that they did not regard the purchaser. If the certificate of registry must be entered at the Custom-house with the indorsements thereon, the ship's owner must be known, and as the purchaser must have the certificate of registry recited in the bill of sale, he will be directed thereby to resort to the Custom-house for any information which he may want. If therefore the public be sufficiently safe without any recital of the indorsements we ought not to hold this bill of sale void, the words of the act not having expressly required their insertion. It has been assumed that no transfer takes place till the indorsement: but that is not true, for the indorsement must always be subsequent to the transfer.

HEATH J. This question turns on the 17th section of the 26 Geo. 3. c. 60. How can the indorsement be considered part of the certificate of registry? The certificate belongs to an antecedent transaction, and is complete without the indorsement, which is not like a condition on bonds or bills of exchange, where it ^{§ 7. R. 483.} alters the quality of the bill or bond, but is only evidence of a subsequent sale, though introduced in that place. We cannot go beyond the words of the act to create a case of forfeiture.

ROOKE J. The 26th of Geo. 3. not having required any recital of the indorsements, we cannot extend its provisions to the prejudice of these parties.

Postea to the Plaintiff.

The Mayor and Commonalty and Citizens of the City
of LONDON v. The Mayor and Burgesses of the
Borough of LYNN REGIS, commonly called KING'S
LYNN, in the County of NORFOLK; In Error.

M.J. 2d

(In the *House of Lords.*)

THIS action was commenced in the Court of *Common Pleas* by the present Plaintiff in error, on the writ *De officio quietum de theolonio.*

action well lies on the writ *De officio quietum de theolonio* in the name of

If toll be merely claimed of the individual members of a corporation exempt from toll, an the corporation.

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The declaration began by mentioning that the corporation of *King's Lynn* was summoned to answer why they required the citizens of *London* to yield toll within *King's Lynn*. It then alleged that the city of *London* was a body corporate by prescription, by divers names, and for fifty years last, by the name of the Mayor, and Commonalty, and Citizens of the City of *London*, and that the citizens of *London*, amongst other liberties and privileges, had time out of mind enjoyed, and still were accustomed and ought to enjoy, the liberty and privilege that they and all their goods should be quit, and free of and from all toll, passage, laftage, and other customs, throughout *England*, and the King's ports, except his prisage of wines; which liberties and privileges were alleged to be confirmed by divers acts of parliament. It then recited that the King, by writ under the Great Seal, commanded the corporation of *King's Lynn* to permit the citizens of *London* to be quit of such toll, and other customs, in *King's Lynn*, or to signify cause why not, but that the corporation of *King's Lynn*, not regarding the writ, had not signified to the King, as by the writ was commanded, and since the writ had disquieted the citizens of *London*, and required of five of them who were named, and of other citizens of *London*, toll, passage, and laftage, not being prisage of wine, of their goods within *King's Lynn* and its port, in contempt of the King, and to the damage of the corporation of *London*, of 100*l*.

The corporation of *Lynn* pleaded, first, that the citizens of *London* had not been accustomed, and ought not to enjoy such liberty and privilege of being free of toll and other customs, except the King's prisage; secondly, that the five citizens named were not citizens of *London*, as alleged.

Issue was joined on both pleas.

In Easter Term, 1789, the cause was tried at the Bar of the Court of Common Pleas, (see 1 H. Bl. 206.) when a verdict was found for the corporation of *London*, on both issues, with one shilling damages, which damages were stated in the record to have been remitted by the corporation of *London* to the corporation of *King's Lynn*. The judgment was, that the citizens and all their goods should be quit of yielding such toll, &c.

On this judgment a writ of error was brought in the King's Bench, and in Hilary Term, 1791, the judgment of the Common Pleas was reversed. (See 4 T. R. 130.)

In consequence of this, the present Plaintiffs brought a writ of error returnable in parliament, and assigned general errors: to which the Defendants having rejoined, the Plaintiffs hoped the judgment of the *King's Bench* would be reversed for the following among other REASONS:

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I. Because the objection made below, by the Defendants in error, that the writ *De effend. quiet. de theol.* is a writ merely prohibitory, on which no action can be maintained, has no foundation. This sufficiently appears from the precedents of attachments on this writ given in the Register (258. b. and the following pages), which run thus: *Si A. fecerit, &c. "tunc pone, &c. B. & C. &c."* being manifestly process to bring in the Defendants to answer to an action.

II. Because another objection, insisted on by the Defendants in error, that the action, supposing an action to lie, ought to be by the individual citizens aggrieved, and not by the corporation of *London*, appears to be equally groundless. In *Fitz. N. B.* (227. E.) it is laid down, that "all the corporation may bring " the writ by the name of their corporation, and may have an " alias and attachment thereupon, if need be;" by which must be understood the process of attachment in the Register, neither that book nor *Fitzherbert* anywhere alluding to a criminal attachment on this writ.

III. Because the objection principally relied on by the Defendants in error was, that this action is not maintainable where no distress has been taken; which objection the Plaintiffs in error submit cannot be supported for the reasons, and upon the authorities following:

It is evident that *De effend. quiet. de theol.* and *Monstraverunt* are no more than different names for the same writ, arising from a very slight variation in the form. The *Register* contains no such title as *Monstraverunt*: but several writs of *Monstraverunt* are inserted in the title *De effend. quiet. de theol.* Burghes may have *Monstraverunt* (*Register*, 259. b.), and tenants in ancient demesne may have the writ *De theol.*; and all the tenants may sue as in *Monstraverunt* (*Fitz. N. B.* 228. B.); so that every authority as to the one is an authority as to the other. Lord *Coke* (1 *Inst.* 100. a.) says expressly, that a man may have *Monstraverunt* before distress; by which he must be understood to mean the action of *Monstraverunt*, having clasped it with other writs, on all of which the

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1796. the remedy is by action. The Register contains several precedents of writs *De offend. quiet. de theal.* and attachments on them,

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King's LYNN. which do not state a distress; and other precedents of the same writ which do. *Fitzherbert*, (N. B. 226. l.) in the outset of the title, describes this writ to lie where the King's officer will demand toll. After giving the form of the writ, he goes on to state that the party may have an *alias, pluries* and attachment against those who grieve him. The natural meaning is, that those other writs are for a repetition of the same grievance complained of in the first; and *Fitzherbert* must be guilty of great inaccuracy if to found the attachment a new and different injury must have been committed in the mean time.

IV. Because this writ is analogous to other writs on which an action may be maintained, and judgment given on the right, without actual damage, (*Co. Litt. 100.*); and such an establishment of the right seems peculiarly beneficial in a case like the present, of an exemption from toll claimed by a large body of persons, where the particular injuries may be very numerous, and in each instance so inconsiderable, that the individuals aggrieved not choosing to incur the expence of legal proceedings, may by continued acquiescence weaken or destroy the right of the corporation; or if those who claim the toll will not distrain for it, but bring actions of *assumpsit*, to which only the general issue can be pleaded, neither the corporation nor the persons aggrieved have any means, if none are afforded by this writ, of stating their exemption on the record, and obtaining a decifion which shall either establish or destroy their claim for the future.

V. Because if the taking of a distress were necessary, this declaration does sufficiently allege it. By the precedent in the Register (258. b.) it appears that "*quietos esse permittere non curaverunt*" is a sufficient allegation in the attachment. The averment in this declaration is, that the defendants did disquiet and did require toll; and it is impossible to contend that the declaration is bad in this respect, without contending that the attachment also, which stands upon the authority of the Register, is equally bad.

VI. Admitting that the declaration ought in strictness of law, to have alleged a distress, the omission of it is mere form, and aided by the verdict. If a distress be necessary to support this action, the words "*quietos esse permittere non curaverunt*" in the attachment must be understood to mean disquieting by distress; and if the defendants had taken issue upon this same allegation in the

the declaration, the Plaintiffs could not, supposing a distress necessary for the support of the action, have entitled themselves to a verdict without proving a distress. An actual distress cannot be more necessary to support this action than an actual impleading to support a *warrantia chartæ*; and yet it is laid down in *Fitz. N. B.* (134. K.) that *in warrantia chartæ*, if Defendant say that Plaintiff was not impleaded, he thereby confesseth the warranty, and Plaintiff shall have judgment to recover it. By the same rule, if the present Plaintiffs had alledged a distress in their declaration, and the Defendants had denied it, they would have admitted the exemption, and the Plaintiffs must have had judgment for the acquittal. Here the exemption is found by the jury; and how can it be contended that the not stating a distress in the declaration prevents the Plaintiffs from recovering the acquittal, when, if the distress had been stated and denied by the Defendants, the Plaintiffs, notwithstanding that denial, would be entitled to recover their acquittal?

VII. Because, whether the exemption claimed by the city of London extended to all citizens, was a matter of fact to be determined by the jury on the trial of the issues; and the exemption being found as laid, the meaning of the term "citizens" cannot come in question here.

J. ADAIR.
V. GIBBS.

The Defendants in error hoped that the judgment of the Court of *King's Bench*, revering the judgment of the Court of *Common Pleas*, would be affirmed, for the following, among other REASONS:

I. It is submitted, that the antiquated writ *De effendo quietum de theolonio*, to which the corporation of London has thought fit to resort, is not *remedial*, so as to bear the process and pleadings of a solemn action; but is simply a command from the crown, which being disobeyed ought not to be followed with any thing beyond an attachment for the contempt. Sir Henry Finch, in his profound discourse on law, (b. iv. c. 48.) is a very pointed authority to this effect. The last chapter in that work treats of certain special writs wherein no process lieth. It begins in these words:—" Thus far of an action, and the several parts of it, and of writs both original and judicial " that begin or prosecute the action. Besides which there " are certain other originals, which are, as it were, special " anomalies

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" anomalies and exceptions from the former, being *not directory to bring any matter into plea or solemn action, but only commandatory or prohibitory to do or leave something undone.* And therefore *no process at all lieth in these Writs, but only an attachment upon a contempt for not executing or obeying them.*"—After this introduction, Sir Henry Finch enumerates various writs of this special nature; and the last but two of these instances is the writ *De effendo quietum de theolonio.*

II. Should the writ *De effendo quietum de theolonio* be deemed so *remedial* as to bear an action, it is submitted to be a point deserving of consideration, whether on the face of the record there is not an error in the process against the corporation of King's Lynn; for the record states them to have been *only summoned*, whereas there are precedents according to which an *attachment* ought to have been part of the process.

III. It is apprehended to be an invincible objection against the corporation of London, that the sort of *gravamen* or injury stated by them in their declaration is not actionable. They do not allege any *taking of a distress* for toll by the corporation of King's Lynn. The injury alleged is simply a *claim or requiring* of toll from the citizens of London. In other words, the action is brought, not for an *actual damage*, not for an *actual injury*, but merely for damage and injury *scared*. It is then an action *quia timet*. But the corporation of King's Lynn are advised, that there are only certain special cases, in which an action *quia timet* is allowed by our law; and that this writ *De effendo quietum de theolonio* is not of the number. Lord Coke in his Commentary upon Littleton, (fol. 100. a.) thus enumerates the instances of actions *quia timet*. " Note, that there be six writs in law, that may be maintained, *quia timet*, before any molestation, distress, or impleading; as, 1. A man may have his writ of mesne, (whereof Littleton here speaks) before he be impleaded. 2. A *Warrantia carte* before he impleaded. 3. A *Monstraverunt* before any distress or vexation. 4. An *Audita querela* before any execution sued. 5. A *Curia classenda* before any default of inclosure. 6. A *Ne injurie vexes* before any distress or molestation.—And these be called *Brevia anticipantia*, writs of prevention." Hence it is plain, that the writ *De effendo quietum de theolonio* did not occur to Lord Coke's extensive learning as one of the few anticipating writs,

writs, on which an action is sustainable before *actual damage* received. It is observable also, that all of the few precedents hitherto explored and appealed to for the corporation of *London* seem to fail of serving their purpose in this respect. The first of these is the case of the 18th of *Edward the First* against the bailiffs of *Southampton* in *Mr. Ryley's Placita Parliamentaria*, p. 13.; and in that case the Abbot of *Saint Edward's Place*, who was the complainant, expressly states, a distress upon his tenants by the bailiffs, and lays *damages* on that account. In the next precedent, which is the case of the King and divers citizens of *Lincoln* against the bailiffs of *Burton*, in the 22d of the same reign, as given in *Mr. Madox's Firma Burgi*, p. 138. the injury stated is, the having been aggrieved and disquieted by *great distresses*, to the damage of the citizens of *Lincoln*, who were joined with the King as complainants. The third and remaining precedent is a case in the *King's Bench*, of the 2d of *Edward the Second*, in which certain tenants of the King's manor of *Brimmefrene* and *Norton* were Plaintiffs; and on a search for this case, made in consequence of its being cited from *Lord Coke's second Institute*, (654. also in *Dugd. Warwickshire*, 1st ed. p. 657.) the record has been found, by which it appears, that the Plaintiffs alledged the making of distresses for toll and a damage thereby of 20*l.* With these precedents, originally cited for the corporation of *London*, but on this point at least operating against themselves, it may be proper to connect the chapter *De Libertatibus* in the second book of *Bracton*, (cap. 24. § 4. & 5. fol. 57. a.) In that part of *Bracton*, notice is taken of the remedy for those disquieted for toll in breach of their privilege of exemption granted to them by the crown. But in the only action there stated for such an injury, both the writ and the count suppose an actual damage received by the Plaintiffs; for the writ calls upon the Defendants to answer *Quare ceperunt theolonium*, and the count specifies a *distress* for the toll to the damage of the Plaintiffs in a certain sum.

IV. It is also conceived to be an objection to the declaration of the corporation of *London* in the present case, that for the injury they have alleged they are not the proper Plaintiffs. The exemption from toll under the royal grants to *London* is conferred in favour of the individual citizens of that place, and these are competent to defend their right of exemption without aid of the corporation. The corporation of *London* is not even within the benefit of the exemption: for it seems to have been admitted in the

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the great case between *Waller* and *Hanger*, in the reign of James the First, (3 *Bulst.* 14.) on the *London* exemption from prifage, that if the chamber of *London* should traffick, it must pay prifage; because it is in their *politick* capacity as a corporation, and the exemption granted enures only for the citizens in their individual and natural capacities. If then an injury has been done in the present case, it is to the particular citizens, who are named as having been diquieted by the demand of toll. But these are not so much as Co-plaintiffs in the action. In point of principle it appears a strong proposition to assert, that the corporation of *London*, upon whom no demand of toll is stated to have been made, and upon whom if they had traded it is apprehended the demand would be justifiable, shall yet be Plaintiffs for the injury from a demand of toll upon individual citizens, who, if the demand is actionable, are capable of suing for themselves. But that the corporation of *London* should be Plaintiffs is not merely quite unnecessary. The receiving of them as such seems to lead to two actions and two compensations for the same injury: for a recovery of damages by the corporation of *London* might not be a bar to an action brought by the particular citizens immediately affected by the demand of toll. Besides it is natural to ask, where are the precedents to be found of such an action by the corporation of any place for an injury to certain of its individual citizens. Here again, the three precedents, already referred to from *Ryley's Placita Parliamentaria*, *Madox's Firma Burgi*, and *Lord Coke's Second Institute*, will not serve the purpose; for in each of them the particular citizens, who were aggrieved by having their right of exemption contested, were Plaintiffs. Thus it seems, that the interference of the *London* corporation, as champions fighting the cause of its citizens against the corporation of *King's Lynn*, is at the same time unnecessary, irregular, and unprecedented.

V. Further it is submitted to be a point deserving of attention, whether the suit in the present case ought not to have been *qui tam*, that is, whether the corporation of *London* ought not to have sued as well for the King as for themselves. Latterly, indeed, the Courts appear to have been less strict, in requiring actions *qui tam*, for matters including a contempt of the King, than in ancient times. But it is to be considered, that in the present case the action is not merely laid to the contempt of the King; but actually proceeds upon a disobedience of the King's command, by writ under the great seal, expressly recited in the declaration

declaration as one of the main grounds of it. It is not the case of a contempt merely *virtual*, but of one of the most *direct* and *express* kind. Perhaps, therefore, it may be found not to fall within the reach of those authorities, according to which a Plaintiff has an election to sue, either for the crown and himself, or for himself only.

VI. Lastly, it is with very serious anxiety submitted on the part of the corporation of *King's Lynn*, that the declaration of the corporation of *London* is essentially defective, in not stating how the five citizens, named as having been disquieted by the demand of toll, are entitled to that denomination. More particularly it is not alleged, that they are both *freemen* and *inhabitant-householders* of *London*, or indeed *inhabitants of any description*. From the silence of the declaration in this respect, it may be inferred, that the citizens named are neither inhabitant-householders of *London*, nor inhabitants in any respect; are not full and complete citizens of *London*; but are persons belonging to and resident in other places, and merely connected with *London* by having purchased its freedom: in other words, are *non-resident freemen*. That this is the real fact of the case, will ~~not~~ it is presumed be disavowed on the part of the corporation of *London*: for, one great object of the present suit between *London* and *King's Lynn* is to have it settled, whether non-resident freemen of *London* are within the benefit of its charter exemptions from toll. It is not, indeed, admitted by *King's Lynn*, that the *London* exemption applies in any respect against the *King's Lynn* port-duties; because as *London* founded upon charters, some of which are ancient enough to constitute a *prescriptive exemption*; so on the other hand *King's Lynn* claims a *prescriptive right of toll*; and thus if the latter can be made out, the question will be, which prescription ought to prevail, that is, which shall be presumed to be most ancient. But though this is certainly a point of controversy between the two corporations, yet, from the general verdict, this point is clearly not open to debate on the present record; and besides the more immediate cause of the present contention certainly was the claim of *London* to shelter its *non-resident freemen* from payment of the *King's Lynn* port-duties. If the wish of the corporation of *King's Lynn* had prevailed, there would have been a special verdict in the present case, which would have brought forward this latter question most completely and directly upon the record. But a general verdict having been given, the corporation of *King's Lynn* is driven

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driven into raising the question about the *non-resident freemen* of *London* by argument and inference from the want of any allegation or mention of residence in the pleadings. However, it is conceived that the corporation of *London* will scarce decline meeting a question so notoriously a main object of their interference by institution of the present suit. It is hoped, also, that should they endeavour to avoid this latter question, there will be found sufficient defect in their declaration to justify forcing the point into discussion: for it is submitted, that where any persons claim to be exempt from the general law of the land, they ought to be very compleat, distinct, and particular, in setting forth the facts by which they qualify themselves for such exemptions; and that merely styling the five persons, named as having been disturbed by the demand of toll, *citizens*, without specifying how they are so qualified, is too loose and general. On the information for a sum due for prisage to the King's farmer, in the case of *Waller and Hanger*, in the reign of *James the First*, it appears from a copy of the original record, that the Defendant, who claimed benefit of the *London* exemption from prisage as executrix of a deceased citizen, pleaded not only that her husband was a clothworker of *London*, and had for twenty years before his death been *continually commorant and inhabiting* within *London*, but that she the widow and executrix was a free woman of *London*, and *commorant and inhabiting* there.

An opening being thus made for the introduction of this great question, whether *non-resident freemen* of *London* are entitled to the benefit of the *London* exemption from tolls? it is deemed proper, on the part of the corporation of *King's Lynn*, to insist against such an extension of the privilege on these grounds:

(1.) It is submitted, that *non-residents* are neither within the words, nor within the intention of the charters of exemption.

In all the *London* charters the grant is in favour of the *homines* and *cives* of *London*. But how can one be said to be a man and citizen of a place, in which he is neither housekeeper, nor lodger, nor an inhabitant in any degree? The criterion of a citizen is *reality*, not merely a *name*. But a citizen without a house, without a family, without residence, is merely *nominal*; he wants the real qualifications. As, too, such a person comes not within the descriptions of a citizen, so he is clearly not within the intent of the exemption. The privilege, as Lord *Hale* (*on ports and customs*,

toms, Part III. Chap. 3.) properly remarks on prisage, is not *intuitu personæ*, but *intuitu loci* (a). It is *local*, not *personal*. It is intended as a favour to persons of one place, in preference to and by way of distinction from persons of other places. But to admit the inhabitants of all places equally, merely because they have purchased the freedom of the place privileged, is to destroy the distinction evidently intended; is to leave room for putting the inhabitants of all places upon the same footing; is to convert a local privilege into a personal one.—Besides, other consequences of holding the privilege to be independent of *residence* are monstrous. It converts a *privilege of exemption* into a *power of exempting*. It transfers the *prerogative of exempting* from the crown to the corporation of *London*, and to every other corporation of the kingdom having grants of the same privilege. Nay, it more than transfers the prerogative of exempting: for it enables the subject to produce the effect of exemption, where the crown cannot exempt; that is, as against grantees of ancient tolls, whose grants of the tolls from the crown are prior in date to the crown grant of exemption from them; for the crown cannot exempt to the prejudice of existing grants of tolls. Further, it not only deducts from the crown the toll, which otherwise would be payable by *London*, and other places privileged in like manner, but enables *London*, and each of those places, to annihilate all ancient tolls for all persons throughout the kingdom; and so, from time to time, to render this species of revenue and property wholly unproductive both to the crown and its grantees. Nay, what is even worse, it tends to change one toll for another;—to detract the ancient toll from its *real proprietor*, who is generally subject to *some burthen for the public benefit*, such as the maintenance of a port,—and to substitute in its place a toll *uncompensated by any such benefit*, for the city of *London* and other privileged places invading this species of property, namely, a sum of money for the purchase of their freedom, both in fraud of the crown and its grantees of ancient tolls, and to the detriment of the citizens of the very place exempted. If being *resident*, and being a *householder*, as well as being a *freeman*, are considered as part of the qualification of a citizen, all this aggregate of mischief and injustice is avoided. But declare, that being a freeman without residence in any character and of any kind is sufficient to exempt, and the whole of such mischief will immediately attach.

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(2.) In the next place it is submitted, that all the authorities, hitherto gleaned, are pointedly against considering *non-resident* freemen as citizens within these charter exemptions; most, if not all of them, excluding even *resident* freemen, not being also *householders* but only inmates or lodgers.

So was it declared against *non-residents*, by the King with the advice of the Lords in Parliament, in the eleventh of *Henry the Fourth*, on a consideration of the *London* charter exempting from prisage of wines.—(See *Rotul. Parl.* 11 Hen. 4. (a) vol. 3. p. 646.)—*Thomas Chaucer*, who as King's butler had the receipt of the prisage duty, complained to the Lords by petition of gross abuse of the *London* exemption from prisage. He represented, that this franchise was not granted to *London* and the Cinque Ports, “except to the end that those persons only “who dwell, and by their service become continual dwellers in “those places, and their children in the said places born, should “have benefit of the said franchise.” His petition next stated a gross abuse of and fraud upon this franchise by the city of *London*; namely, that “in the city of *London* it is and has “been used of long time, that every foreigner not free in the said “city, who will come to the mayor, chamberlain, or the masters “of any trade in the same city, and pay a small sum of “money to the chamber, or to the masters of any trade of the “same city, shall be received into the said freedom, as well as “he who at all times is a continual dweller in the same city, “notwithstanding that he is of another town or borough, to the “disinherition of our said Lord the King, as well of the prisage “which he ought to have of every such man not free, as of all “other customs and duties to our said Lord the King also “from them due.” The conclusion of this petition runs thus: “May it please you to consider how the estate as “well of our Lord the King as of his crown may be pre-“served without destruction or prejudice, and thereupon to “ordain, that due remedy may be provided in that respect, that “is to say, by praying our Lord the King and his very wife “council to send for the mayor and aldermen of *London*, “commanding them as well in their own persons as the mas-“ters of the different trades of the said city, to cease in future, “so to grant their freedom to any foreigner, under peril of

(a) The paragraph at which this case begins is, in the printed copy, marked 73. No number is prefixed to the case, but it follows No. xxxii. and is the last in the Roll. 11 H. 4.—An abstract may be seen in *Cotton's Records*, p. 476.

“*forswiture*

"*forfeiture of the franchise of the same city, and also to repeal
the freedoms to such foreigners already granted in any trade
within the same city, if they have come to the said freedom in
manner aforesaid, in regard that otherwise in a short time, as
well our said Lord the King who now is, as his heirs, who
should be Kings in future, will be disinherited of all their pri-
sage of wine throughout the whole kingdom of England, by the
freedom of the same city of London.*" To the petition thus
forcibly concluding, the answer is as follows: "The King will
send for the mayor and aldermen of the said city; and fur-
ther has declared by advice of the Lords in Parliament, that
*none hath or enjoys such freedom in this case, if he be not a
citizen, resident and dwelling within the same city;* and that
all others dwelling in other cities and boroughs, or towns, &c.
have and enjoy *their own franchises* to them granted, saving
always to our Lord the King his Inheritance in THIS case."—
Thus emphatically speaks this famous Parliamentary Record; not to the city of *London* only, but to all other cities and places in the kingdom having like privileges of exemption from prifage and other tolls and duties payable to the crown. All are equally told, that such privileges as well in the case of *other* tolls and duties as in the case of prifage, are *local*: that they belong to the real *inhabitants* and *dwellers* of the places on which the crown has bestowed the privilege of exemption: that selling or giving the freedom of *London*, or of any other place to persons residing elsewhere, to enable their enjoyment of the same privilege, is not only an unavailing abuse of their power of admitting freemen, but perhaps a fraud upon the crown and its grantees not altogether without dangerous consequences to those practising it: and that *length of time* in practising such fraud will not legalize it.

With this parliamentary declaration against *non-residents*, the language of the Courts of *Westminster-hall* from the most ancient times, to which this point about exemption from tolls is traceable, appears to have uniformly accorded. To evince this, it is deemed proper to take a review of the adjudged cases.

1. The first of them is *Knoll's case* in the *Exchequer*, as long ago as the reign of *Henry the Sixth*. It is cited by *Calthrop, Recorder of London*, in his book on the *Customs of London*, pages 34. and 35., where he explains what persons shall be discharged under the *London charter* of the first of *Edward the Third*, which grants, that no prifage of wine shall be taken from the citizens of

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London. In commenting upon the distinctions and degrees of citizens, his words run thus: "The first is, he that is a citizen of London for the bearing of offices in the city, and such *special intents*; because he is a *freeman* of the city, but not a citizen in *residency* and *continuance* in the city; for he inhabiteth and dwelleth out of the city. And such a citizen as this is not such a citizen as shall enjoy the benefit and privilege to be discharged of the payment of prifage, according to the resolution given in the *Exchequer* in the case of one *Knolls, Trin. 4 Hen. VI. Rot. 14.*, where it was ruled, that one that was a citizen and *freeman* of London, but dwelt in Bristol, might not partake of the benefit of this charter, insomuch that he, by reason of his dwelling out of the city, was only a citizen to a *special intent*." This same case is cited in *1 Ro. Rep. 140. 142. 148.* and *149.*, particularly by Lord Chief Justice *Coke*, who refers for it to the *Communia Placita Scaccarii* of *4 Hen. VI. Roll. 14. or 18.*: and by his manner of stating the case, it appears, that *Knolls* had a *shop* and *servant* in *London*, and yet was excluded, because he himself did not inhabit there. Lord Chief Justice *Fleming* and Judge *Croke*, in *3-Bulstr. 4. and 9.* cite the same case.

2. The second case is the Attorney General against *Henry Sacheverell* and *Thomas Snede*, which was adjudged in the *Exchequer* in *Easter*, *44 Eliz.* and began there *Hill. 43 Eliz.* It is cited in *Calthrop's London*, *35. Sir John Davis's Reports*, fol. *10. b. 3 Bulstrode*, *5. 1 Ro. Rep. 140. 142. 148.* and by Lord *Hale*, in his *Treatise on Ports and Customs* (*a*). According to all these accounts of the case, the point decided was not merely that *residence* was necessary to intitle a *freeman* of *London* to exemption from prifage under the word *cives* in the *London* charter of the first of *Edward the Third*, but that he must be a *houholder* also, inhabiting as an *inmate* being held insufficient, because *inmates* are not *full scot and lot men*. The most pointed account in print of the point in this case is by Sir *John Davis*, which being translated, is as follows: "The charter of *London* was allowed in the *Exchequer* of *England*, *44th of Elizabeth*. But the question there was, if a citizen of *London*, who has not a family, nor pays scot and lot, but sojourns in the house of another, shall have the benefit of the said charter? In the argument of which case, *Coke*, then Attorney General, put this difference of citizens, viz. that there is a *citizen nomine*, a *citizen re*, and a *citizen re et nomine*.

(*a*) *Hargrave's Law Tracts*, p. *128.*

* But it was resolved, that only the citizen *re et nomine, viz.* he "who is a *freeman*, and also *inhabits* and *pays scot and lot* "there, shall be free of *prifage* by the said charter." But this case being important, the record itself has been searched for; and from a copy of the record, the case appears to have been to this effect:— Sir *Edward Coke*, Attorney General, informed for the Queen against *Sacheverell* and *Snede*, for taking and carrying away, and converting to their own use, five tons of *Gascoyne* wine, the property of the Queen; and the Defendants pleaded not guilty, upon which the case went to a jury, who found a special verdict. In this verdict the charter of the first of *Edward* the Third, exempting the citizens of *London* from *prifage*, is given *verbatim*. It next states, that the Defendants for two years past had been freemen of *London*, one being free of the Company of *Haberdashers*, and the other of the Company of *Mercers*; and that during the same time they were both *abiding, lodging, and resident* within the city of *London*, but *without any family or household*. It also finds, that they were taxable, and liable to *scot and lot* within *London*, but were never taxed or so burthened there. The verdict next states, that they had both taken the oath of a freeman of *London*, which is given at length, and one part of which is expressed to be contributory to all taxes *scot and lot* and other charges *as a freeman ought*. Then the verdict mentions, that the Defendants on such a day imported into the port of *London* from foreign parts 52 tons of *Gascoyne* wine, and before seizure or payment of the Queen's *prifage*, caused them to be landed and to be lodged in a cellar; and that 5 of the tons were seized by *Lawrence Smith*, a Queen's officer, for *prifage*, and afterwards taken from him by the Defendants. It was next found that *for fifty years last past no citizen or freeman of London, inhabiting and residing in it as it is done by the Defendants, used to pay any prifage of wine to the Queen*. But whether on the whole matter the Defendants were guilty, the Jury leave to the Court, assenting 50l. for the five tons, and 10l. for costs against the Defendants, if the Court should find them guilty. After this special verdict there appear to have been several adjournments by the Court to advise upon the matter. But at length, in *Trinity Term*, in the 44th of *Elizabeth*, the Barons gave judgment against the Defendants.— From this abridgment of the *Latin* record it is plain, that, according to the solemn judgment of the *Exchequer* in this case, a freeman of *London*, to have benefit of the exemption from *prifage*,

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must be *not only resident*, but also a *houholder*. It is also apparent that the Court so construed *cives* in the charter of *Edward the Third*, in spite of an *uninterrupted usage of fifty years*, found by the jury in favour of resident freemen being only *inmates* and *lodgers*. Further it is clear, that in the 44th of *Elizabeth* there was not so much as a pretension to have *cives* in the *London* charter of exemption from prisage, construed as including any freeman without residence: and that then the only point was, whether a *freeman* should not be a *houholder* as well as *resident*. Nor is this the whole; for the record of this case shews, that the *oath of a freeman of London* was before the Court; and that notwithstanding the engagement in that oath to contribute to taxes, and submit to scot and lot, but which indeed is qualified by the very significant addition of the words *as a freeman ought*, the Court would not dispense with the *freeman's* being a *resident houholder*. Therefore this record exhibits the decision of the Court in a stronger point of view against the extension of the privilege to resident freemen being only lodgers, than any account there is of the case in the printed books.

3. A third authority is the case of Sir *Thomas Waller*, a patentee or lessee of the crown for prisage of wine, against *Francis Hanger*, in the 9th of *James the First*. It is reported in *Calthrop's London*, p. 2. *et seq.* in 1 *Ro. Rep.* 138. in *More* 832. and in 3 *Bulst.* 1. There is also existing a manuscript report of the case, in a volume, which is written in an ancient hand, and heretofore belonged to the *Yelverton library*. The case is also shortly stated by Lord *Hale* in his *Treatise on Ports and Customs* (*a*), and in *Hardr.* 302. and 1 *Sid.* 130. From a copy which has been obtained of the record, it appears, that the case is entered *Easter 9 Jac.* in Roll. 163. and that it began in the *Michaelmas term preceding*. It was frequently argued both at the bar and from the Bench; and on account of difference of opinion amongst the judges it seems to have at last gone off without any judgment. The general point of the case is foreign to the present purpose: for it was, whether the wines of a citizen of *London*, who died, whilst part was at sea, and whilst other part was in the port of *London*, but before bulk broken, were exempt from prisage in the hands of the Defendant, his widow and *executrix*? However, all the reports of the case are full of a great variety of matter, shewing the necessity both of being *resident* and of being a *houholder*, to qualify a *freeman of London* for exemption from prisage. Even the Defendant's own

(a) *Hargrove's Law Tracts*, p. 121.

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pleading implied that *inhabiting* within *London* was essential to complete the title of citizenship for the purpose of their exemption; the defendant, as in a former part of these reasons has been stated, pointedly alleging the *commorancy* and *inhabitancy* of her husband, and after his death of herself, so as to shew, that both were *resident* in as well as free of *London*. The judges and counsel also appear to have been unanimous in considering actual residence as indispensable. Nor is it a little singular, that though we have the arguments of two Chief Justices and five other judges, and though on other points they differed most widely, yet there is not one of those arguments which doth not amplify upon the absolute necessity of being a *resident householder* of *London* as well as a *freeman* to constitute the character of *citizen* for the exemption from prisage. Even *Calthrop*, who as Recorder of *London* may be presumed to have been partial to its claims, in his account of this case, is full to the same purpose. It would be almost endless to give the variety of phrases which the Chief Justices *Fleming* and *Coke*, and all the other judges successively used to prove how indispensable they deemed it to the description of *civis*, that the person claiming the privilege of exemption should be a *resident*, nay, a *householder* as well as a *freeman* of *London*. Instead of attempting so much, it may be sufficient to give Mr. Serjeant *Moore's* summing up of the arguments of the judges on this branch of the argument. His words, being translated from the law *French*, are these: "It was
 " resolved by all, that he who is *civis* and *liber homo* to take the
 " benefit of this privilege, ought to be *free* of the city, and
 " also an *inhabitant* within the city, and also to be a *pater-*
familias within the city. For one may be *free* of the city,
 " and not *civis*; as if he removes and lives elsewhere. He may
 " be a citizen by *habitation*, and yet not *free*. He may be a *citizen* and *free*, and not a *housekeeper*. And in all these cases he
 " shall not have this privilege." Thus it is proved by this third authority, that in the reign of *James the First*, being an inhabitant householder was so absolutely necessary to qualify a freeman of *London* for exemption from prisage as a *citizen*, that not even their own law officer and counsel would set up a pretension to the contrary. It should also be attended to, that throughout the numerous arguments in this case, there is not any thing like confining this interpretation of *civis* to the single charter of *London* for prisage. On the contrary, there are various ancient autho-

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ties cited to shew, that the word *civis* bears the same sense, and is understood with the same restriction, in respect to other matters and privileges of *London*. A short extract from the manuscript report in law French of this case of *Waller and Hanger*, will serve as an instance; for in it *Coventry*, afterwards Lord Keeper, though one of the counsel for extending the exemption to Mrs. *Hanger* the widow, is represented as making the following admission to the other side. "He is not a *citizen of London* if he is "not a *resitant* there and taxable to *scot and lot*, 38 *Aff. pl. 18.*" 45 *E. III. 26. 5 Hen. VII. 10. 19.* for if he is not *resitant*, he "cannot devise lands in *mortmain*," &c. (a) Another instance is the following passage from *Bulstrode's Report* of Judge *Houghton's* argument in *Waller and Hanger*. After citing one *Oates's* case, from 38 *Aff.* and 45 *E. III. 26.* on the *London* custom of devising in *mortmain*, Judge *Houghton* is made to proceed thus: "And there "it is said by *Fincheden*, that citizens ought to have such franchises, "scilicet, those to whom such franchises did extend, scilicet, those "which were born and inheritors in the same city by way of herit- "age, or which are *resitants*, and *taxable to scot and lot*; and that "he, which is not so, shall not be said to be a *citizen*." The same judge, after adding other words to explain that a citizen of *London* means one who is *commorant and resitant*, and subject to *scot and lot*, and liable to supply the places and offices there eligible, says, "if he be not such a one, he shall not be said to be within "the privilege of a *citizen*." Lord *Coke* also, then Chief Justice of the King's Bench, is stated by *Bulstrode* to have argued generally that a citizen without residence is not, in judgment of law, a *citizen*. The whole passage, from this part of Lord *Coke's* argument, is so full of pertinent matter, that it deserves to be here stated. According to *Bulstrode* these were his words: "Civis is taken five manner of ways in our books. First, *civis re et non residentia*; and such a one is not, in judgment of law, a *citizen*. And this appears to be so by 35 *Hen. VI. fo. 12. pra-*

(a) *Vide tamen Br. Abr. tit. Mort-
maine, pl. 35.* where the case in 38 *Aff.*
¶ 45 *Ed. 3.* is thus abridged and com-
mented upon: "Vide que nul poit devise
in mortmaine in *London* mes cestuy que
est citizen, et nee et inhabite in *London*.
Quere indi, et vide librum *London* de lour

" customes, car ceux livers bic ne scient le
verity ut credo, car fuit autrement use in
London poft hoc, ut dicitur, mes chelcun
ownor poit devise la al lay home, mes
nul poit doner in mortmaine, car ceo est
hors del custome, mes poit devise in
mortmaine."

"*cipe I.B.* in debt, *civem Eboraci non residentem* (a). 36 Hen. VI.
 " fo. 28. *civi et pannario* Londini, and he did not dwell there:
 " this is not good; for he may be *pannarius de London*, and
 " yet dwell at *York*. 4 E. IV. fo. 10. where one is *civis de Lon-*
 " *don*, and dwells in another place. And if this sufficeth not
 " *in legis estimatione, non sufficit in regis concessione*. If he
 " be a *resident only in name*, this is not good by the 24 E. III.
 " fo. 7. 5 Hen. VII. fo. 10. and 19. If he be not a citizen and
 " a freeman, he cannot by the custom devise his lands in mort-
 " main. Also if he be but *inquilinus*, this will not serve his
 " turn; but he ought to be a *continuing citizen, and resident*.
 " He ought to have *ius habitationis* and *ius societatis*. If in
 " the interim he happens to be disfranchised, he shall not then
 " have the benefit of this discharge of prisage, but he ought to
 " be a continual citizen. And if all these do concur in him,
 " and he continues to be *civis*, then he is every way complete,
 " and enabled to enjoy the benefit of this grant of discharge.
 " *Bracton*, fol. 411. (b) comprehends all these in one word,
 " *scilicet barones Londini*." Here then Lord Coke not only
 makes the *ius habitationis* and the *ius societatis* both equally es-
 sential for the *London* discharge from prisage; but partly infers
 it from their being so for the privileges of citizenship there.

4. A fourth authority is another case of prisage; namely, the case of Sir William Waller, before the Barons of the *Exchequer*, in *Michaelmas*, 4 Cha. I. It is given by Lord *Hale*, in his *Treatise on ports and customs* (c), but without the name of the Defendants. There is not any other report of it: and the search hitherto made for the original record has not proved successful. However, Lord *Hale* having reported the case, puts its existence beyond a doubt. According to Lord *Hale* the general question was, whether the exemption of the citizens of *London*, under the first of *Edw. III.* or otherwise, did extend to wines imported by them into *Bristol*, or other the out-ports? Having made this to be the great question,

(a) See the same case abridged, *Br. Abr. tit. Additions*, pl. 13. The writ was in debt against A. B. *civem Eborum*. It was moved to arrest the judgment on the statute of Additions, (1 H. 5. c. 5.) because it did not appear in the writ of what place the Defendant was, for he might be a citizen of *York*, and reside elsewhere. The Court

were of opinion, that the objection could only be taken advantage of there by plea in abatement; though if the Defendant had been outlawed, the exception would have been good.

(b) *Lib. 5. Tract. 5. cap. 14.*

(c) *Hargrave's Law Tracts*, p. 128.

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he next states, that after several arguments the Barons, *una voce*, resolved three several points. The first resolution was, that by special words, such as *infra civitatem vel extra*, the King might have exempted the citizens of *London* from prisage at the out-ports. The second was, that for want of special words, and for other reasons, the exemption was confined to the port of *London*. The third was, that “*bona civium* must not be intended of *every freeman of London*;” but that the person must be, first, a *freeman of London*, secondly, an *inhabitant of London*, and, thirdly, a *houholder within the city*. In explanation of this last part of the qualification, Lord *Hale* adds, that an *inmate* is not exempt; “Because such a man *contributes not to scot and lot*, nor is *beneficial to the city*; and this privilege was granted *intuitu civitatis*, “not *personæ*; and the grant being *in diminution of the King's revenue*, shall be construed as strictly as may be, and the word “*civis* be taken in as restrained an exposition as may be.” Thus, according to Lord *Hale*, the judges were again unanimous in construing *civis* on the *London* exemption from prisage as meaning, not the *mere freeman*, but a freeman being also an *inhabitant houholder*. Thus, too, this construction was again adopted, upon a reason, as applicable to other duties, part of the ancient revenues of the crown, as to the prisage duty; namely, that the exemption granted to the citizens of *London* was founded upon *locality*. A further and auxiliary reason is indeed added to the resolution in this last case. But that reason also applies with no less force to other ancient crown duties than to prisage; for in both cases an ancient revenue of the crown is diminished.

5. The next authority applicable is a prisage case before the Court of *Exchequer*, on the Equity side, in *Michaelmas*, 14 *Cha. II.* whilst Lord *Hale* was Chief Baron. It was between Sir *William Waller* and *Giles Travers*, and is reported in *Hardr. 301.* but appears more fully from a copy which has been obtained of the decree. The general question in this case was the same as in Sir *William Waller's* case in the 4th of *Cha. I.* namely, whether the exemption of the citizens of *London* from prisage extends to the out-ports, or is confined to the port of *London*. When the proofs in this cause had been taken, and it came on for hearing, and the counsel had been heard, the Court ordered, that a case should be agreed on between the counsel on each side, and that upon this case there should

should be an argument. Accordingly a case was agreed upon, and it is mentioned in the decree, that Sir Peter Ball argued for the Plaintiff, and Mr. Serjeant Hardress for the Defendant. Of the argument of the counsel for the Plaintiff Waller there is no report. But Mr. Serjeant Hardress gives his argument for extending the exemption to the out-ports very much at length, and in it great learning is exhibited. However, the determination of the Court was again for the patentee of the crown, and for confining the exemption to the port of London; and the Barons appear to have been unanimous; and Lord Hale, then Chief Baron, in order to put the question quite at rest in future, seems to have taken great pains in framing the decree; for it not only states the case agreed on at length, but particularly enumerates the grounds upon which the Court gave judgment. The general point decided in this case is foreign to the present consideration. But several things are to be collected, which, it is apprehended, bear upon the point of residence. First, it appears by Hardress's Report, that the Defendant pleaded himself to be not merely a *freeman*, but a *citizen* also. Secondly, it appears from the case stated in the decree, that the Defendant made out his title of citizenship by proving, that, at the time of the importation of the wines for which prifage was claimed, he was not only a *freeman* of London, but also was an *inhabitant dwelling* in the city of London, and *did pay scot and lot* there. Thirdly, according to Hardress's Report, Mr. Baron Atkyns, in his argument, repeated the doctrine of the former cases as to the necessity of being an *inhabitant householder* of London, as well as a *freeman*. His words are these: "He that enjoys this privilege must be *civis et liber homo*; free of the city and an *inhabitant* within the city, and a *pater familias* too. If he want any of those qualifications, he is not entitled to this privilege, as was resolved in Hanger's case." Fourthly, it appears from Hardress's argument, that there was *strong evidence* for the Defendant, of *non-payment of prifage by the citizens of London at the out ports*: for he says, "we have it in proof, as far as a negative can be proved, that prifage has not been paid for citizens' goods, though imported elsewhere than at the port of London." This becomes material for shewing that such negative evidence, without something more, will not suffice to rule the construction of a charter of exemption, if the sense of the words is clear against the exemption claimed.

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claimed. Should any reference be made on the part of *London*, to their having given such negative evidence on the trial in the present case, it will be material to recollect, that both in this last-mentioned case of *Waller and Travers*, and in the case of *Snede and Sacheverell* before stated from the Record, the exemption was in vain propped up by negative evidence in its favour; in the former, as *Hardres* describes it, by proving non-payment, *as far as a negative is capable of being proved*; and in the latter, by an absolute proof, as the Record speaks, that there had been *no payment for fifty years last past*. — Fifthly, there is a passage in the decree of this case of *Waller and Travers*, which shews, that both for the sake of *London* itself, and for the sake of the rest of the kingdom, the Court thought it their duty not to encourage the least extension of the *London* exemption from prisage. For one of the reasons in the decree is, “that to construe their exemption to extend unto the wine “of the citizens of *London*, imported by way of merchandize “to the out-ports, would not only abate the trade of the city, “but would be a great prejudice to the trade of wines in general “throughout the kingdom; for that they should be thereby “enabled to undersell other men, and engross the whole trade “in the out-ports, which cannot be presumed to be intended.” Now the principle of the first branch of this reasoning, with a little change of words, may be brought to bear in some degree against the general exemption of non-resident freemen of *London* from tolls and duties; for to bring non-residents within such privilege, is to enable the corporation of *London* and its companies, to deprive its real and compleat citizens of the exclusive benefit intended, by admitting the inhabitants of other ports and places into a participation. Thus in one point of view, even *London* itself is interested against extending their charter exemptions to non-residents; for the value of the exemption must diminish in proportion as the number of participants in it is increased. Even the latter branch of the reasoning of the decree is not only inapplicable; because, if non-resident freemen of *London*, are to be exempt, then *London*, by a partial gift of its freedom to particular persons, of particular places, may discourage trade and commerce in all others, and so cause a general prejudice.

To those five cases of prisage, with the accumulation of authority and reasoning comprised in them, it is thought proper to add some

Some extracts from the writings of Lord *Hale*, relative to the same subject.

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In an original manuscript of Lord *Hale*, intituled, “*Preparatory Notes touching the Rights of the Crown*,” where he writes upon exemption from prifage, he thus expresses himself: “ This privilege belongs in general to the City of London, by a charter of 1 E. III.; to those in the Cinque Ports in respect of their service with fifty-seven ships, and to the ancient members thereof; and by *Carta Mercatoria* to the Hanse merchants, upon their undertaking to answere two shillings per tun upon all wines by them imported. But here observe, 1. That no person can take the benefit of this privilege granted to London and the Cinque Ports, unles he be free, and also contributory to scot and lot, the grant to London being, *quod de vinis civium nulla prisa*, &c. And therefore *Michaelmas 9 Jac. inter Waller and Hanger*, where a citizen, owner of wines, died before the bulk broken, it was a great question, whether the executor should have the privilege or no.” This passage not only is exprefed, so as to amount to an opinion from Lord *Hale* himself, that the exemption from prifage is properly conſtrued to exclude freemen of London not being actually contributory to scot and lot; but extends the same opinion to those of the Cinque Ports. The grant of 1 E. III. to the Cinque Ports is to the barons of those ports and their heirs, which is interpreted to include all freemen of the Cinque Ports. But this extract from Lord *Hale* expressly puts them on the same footing with the citizens of London; not admitting the citizens of freemen of either place, unless they are contributory to scot and lot there as well as freemen.

In chapter 13. of the same manuscript, which is on the King’s power of ordering commerce and trade, Lord *Hale* writes thus: “ Those that had an exemption from prifage were, — 1. The citizens of London paying scot and lot.—2. Merchant strangers, who by *Carta Mercatoria* were exempt from prifage paying butlerage.—3. The barons of the Cinque Ports. *Inter Com- munia Pacis. 7 E. III.* it came in question, whether a merchant alien, being made a freeman of Sandwich, was liable to butlerage or no. It seems by the latter opinion he was; because it was a sum due by contract of the merchants aliens in compensation of the remifion of other duties, or at leaft that “ the

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" the mayor and burgesses of the port were *fineable for admitting him to that liberty*. But it is not adjudged." — Here Lord *Hale* again states the exemption of *London* from prifage, as a privilege confined to the *real* and *compleat citizens* of *London*, to *freemen contributory to scot and lot there*. — Something further also is brought to light by this last extract from Lord *Hale's* manuscript. It is, that there may be such a thing as an *abuse of the power of making freemen*: that there may be a *fract* upon the crown and the proprietors of ancient tolls under royal grants, by *making freemen merely to avoid such payment*: and that not only freemen so made are excludable from the beneficial privileges aimed at, but perhaps the makers of them are in some way or other accountable for abusing their franchise: and still further, that though *London* and other places having like privileges may give or barter away their freedom, so far as themselves and their own interests are concerned; yet they may not have the right of so acting at the expence of the rights and property of others. In this last remark, as to the inefficacy and irregularity of attempting to extend the privileges and exemptions of the citizens of *London* to the inhabitants of other places, there is little more than repetition of the doctrine, which Lord *Hale* himself, once more declaring his opinion against such an abuse of franchise, has actually and pointedly expressed. The passage meant is in page 127. of the printed volume containing Lord *Hale's* Treatise on Ports and Customs (*a*); for these are his words explaining the extent of the prifage exemption of the Cinque Ports. . " It doth extend only " to such as are *truly members* of the Cinque Ports, and pay " *scot and lot there*. And therefore anciently those of the " Cinque Ports were *fined*, if they did *colourably admit any person to be a freeman of their ports* that was in truth *no inhabitant* there, merely to gain the privilege, *viz. si aduocare voluerint aliquem de libertate suâ effe qui non est.*"

Upon the whole of this last and grand question in the present contest between *London* and *King's Lynn*, it is submitted for the latter,—that the *London* privilege of exemption from tolls and duties is *local*:—that none but the *real* and *full citizen*, namely, the *freeman* of *London*, being also an *inhabitant-houſholder*, or at least an *inhabitant*, is legally participant of such exemption:—that though by being a *freeman* of *London* a man may become a *citizen* for certain intents, and may as such be subject to corpor-

(a) *Hargrave's Law Tracts.*

tion offices and certain other duties and payments; yet that no one can be a compleat citizen, a citizen for *all intents* a compleat scot and lot man, a scot and lot man for parochial and *other* purposes as well as for *corporation* offices and duties, without being an *inhabitant-houholder* as well as a freeman: — that if the grant of exemption should be otherwise construed, instead of being merely a grant of exemption to the citizens of *London*, it would be also a grant enabling the *corporation* and companies of *London* to exempt the inhabitants of every place in the kingdom: — that if inhabitancy was not one part of the qualification of a citizen on these exemption charters, all the ancient tolls in the kingdom would be from time to time saleable and disposeable by *London* and every other place having like grants of exemption, to the disinherison of the crown and all deriving title to such property under royal grants: — that the cases and authorities in respect to exemption from *prifage* of wine are direct authorities, against including within other exemptions any but *freemen* being also *inhabitant-houholders*; the *London* exemption from *prifage* being granted for the same description of persons as the *London* exemption from other tolls and duties, and the reasons for excluding the *mere freemen* being the same in both cases: — that to hold, that *civis* in the *prifage* charters described the *full citizen* of *London*, the *freemen* being also an *inhabitant-houholder*, but that the same word in the charter for the other exemption described the *half citizen* of *London*, the *non-resident* *freeman*, would be a monstrous construction without the colour either of language or of principle to sustain the distinction: — that the parliamentary record of the 11th of *Henry the Fourth* excludes non-resident *freemen* of *London*, as well from the general exemption as from the *prifage* one, expressly representing the mischief of any other construction as the same on both exemptions: — that in all the cases since, there is not so much as a hint at a distinction between the *prifage* exemption and the general exemption in this respect, there being on the contrary a generality of language embracing both as within the same principle of construction: — that, in so plain a case, any evidence of non payment by the *freemen* of *London* without regard to inhabitancy ought now to be deemed as unavailing in the instance of *other tolls and duties*, as it formerly was adjudged to be in the instance of *Prifage*: — and further, that to permit *London*, through its freedom, to extend its privileges of exemption to the inhabitants of *other places*, would not only be substituting a toll to the invaders of property for toll to the real proprietors;

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prietors; but would even be sacrificing the privileges of *London* itself, that is, the privileges of its real and individual citizens, to the lucre of its corporation and trading companies.

To conclude, it is hoped on the part of *King's Lynn*, that the present attempt by *London*, to make its freedom subservient to the purpose of evading all the ancient tolls of the kingdom, will be condemned as an abuse of franchise equally unavailing and unbecoming; and that the corporation of *London* will be effectually reminded in the language of Lord Coke whilst Chief Justice of the *King's Bench*, that—*a citizen without reverence is not a citizen in judgment of law.*

T. ERSKINE.

S. LE BLANC.

FRASS. HARGRAVE. (e)

This case was argued at the bar of the House by *Adair Serjt.* and *Gibbs* for the Plaintiffs in Error; and *Le Blanc Serjt.* and *Erskine* for the Defendants; and the opinion of the Judges was thus delivered by,

EYRE Ch. J.—This is a proceeding founded on the writ *De effendo quietum de theolonio*, a proceeding so far removed from common use, that it has been doubted whether or not it ever prevailed. It is not therefore to be wondered at, if in this attempt to revive it many difficulties should occur; that they should not be of easy solution; that they should divide the opinions even of learned men. We are called upon to offer our opinion under all these circumstances. It is our duty to obey. We shall offer it with the deference due to the opinions of those from whom we may differ. The long and frequent, and able discussion which the subject has undergone, must have assisted to throw light upon it—We have this advantage, that we have heard all that can be offered. We have endeavoured to profit by it, and have ourselves examined the subject as fully as the time with which we have been indulged would permit.

The judgment of the Court of *Common Pleas* has been objected to on four grounds:

First, the writ *De effendo quietum de theolonio* has been supposed to be a mandatory and prerogative writ only, the proceedings upon which must end with bringing the party into contempt.

(e) These reasons for the Defendants in error are to be found in the Appendix to *Hargrave's Juridical Arguments*, vol. 2.; and were drawn up by the learned author of that work. The manuscript volume of Reports cited ante 502., is in the possession,

and the property of Mr. *Hargrave*; and the manuscript of Lord *Hale*, intitled "Preparatory Notes touching the Rights of the Crown," cited ante 509., is also at present in the possession of the same gentleman.

Secondly, it is said, that if judicial proceedings can be founded upon it, the citizens of *London*, in their corporate capacity, are not the proper parties to sustain those proceedings. One of the reasons is, that if toll be taken or even demanded, it must be from the individual citizen, and that the injury, if any, must be to him, and not to the corporate body; and that the party injured is the only party competent to sustain an action for the injury. And this leads to the

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Third objection, that no particular damage to any one is stated in the court; that it states only, that the corporation have been disquieted by the Defendants on the occasion of the Defendants' demanding toll, and that the Defendants had required certain individual citizens to pay toll: that neither the general allegation of disquieting, nor the particular instance alleged, the requiring the parties to pay toll, amount to damage or to injury, which can be the subject of an action. And it is particularly insisted on, that nothing short of an actual distress for the tolls can be the foundation of a proceeding of this nature.

A fourth objection is stated, on the ground that freemen of the city, not resident, not householders, not paying scot and lot, cannot be entitled to be quit of toll.

We have no difficulty in pronouncing against the first objection, on the authority of the Register, which is conclusive. The attempt to explain the attachment mentioned in the Register, and to shew, that it is merely an attachment for the contempt of the King's writ, fails altogether. It is sued out by the party complaining. It has not effect until the party has given security to the sheriff that he will prosecute his complaint. The words are, "Si A. B. fecerit te *sécurum de clamore prosequendo*"—It does not take the body—"tunc ponas per vadum et salvos plenos" being an authority only to distrain the party by his goods and chattels to compel his appearance, as Sir *Henry Finch* (a) treating of actions which concern the realty, has very clearly shewn. It follows the *pluries*; which *Fitzherbert*, speaking of the writ *De effendo quietum de theolonio* (*N. B.* 227. *A.*) says, is returnable in the *King's Bench* or *Common Pleas* at the will of him who would have it; and this attachment is also returnable in a court of common law, where, upon the appearance of the Defendant, the Plaintiff proceeds to count against him.

In a word, this attachment is that which is the common process on those writs of right which are the commencement of real actions,

(a) See Book iv. chap. 2. 4.

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not being pleas of land. The *Monstraverunt* is one of those real actions. In the Register it is called “*Loquela, quæ est coram vobis per breve nostrum de recto.*” And this form of attachment is the process on that writ.

We find nothing in our books which in any degree countenances this objection, except a passage in the second and subsequent editions of Sir H. Finch's Discourse on Law, in four books: the passage I allude to is in the chapter added to the work, which most certainly is not to be found in that place in the original edition in French, published in 1613, with a dedication by the author himself to King James; and it has escaped my search, if it be to be found anywhere in that work. Probably it might have been found after the death of Sir H. Finch, among the collections of that work: and it may have happened, that the officious zeal of an editor has added to the work that which the better judgment of the learned author led him to reject.

If Sir H. Finch's memory is to be charged with a publication, which I take to be spurious, I ask, where did a text writer in the beginning of the 17th century find this doctrine laid down? from what sources did he collect it? and on what authority does he assume as clear law, a proposition flatly contradicted by the Register, which has always been considered as the highest authority to which we can appeal in questions of this nature, and by Fitzherbert's *Natura Brevis*, a book of little less authority? This chapter in Finch is as incorrect and unfounded in other particulars as in this of the writ *De effendo quietum de theolonio*: for instance, it includes among these unproductive writs the writ *De corrodio habendo*; which Fitzherbert states expressly (N.B. 231. A.) to be a writ, in which there shall be an *alias pluries*, and attachment, if need be. On this first point we have never entertained any doubt.

The second objection is, that the corporation of London are not the proper parties to sustain a suit grounded on the writ *De effendo quietum de theolonio*.

One of the reasons urged in support of this objection, viz. that the corporation can have sustained no damage, I shall have occasion to consider, when I come to the examination of the third objection: at present I have to observe, that the right insisted upon is a right by prescription; that it is the body corporate who prescribe; that there seems to be nothing incongruous, and on the contrary there is an appearance of propriety, in making them defendants or plaintiffs in a writ of right, in whom the right is vested, even admitting the right to be of such a nature, as to be

only

only or principally enjoyed, and fruits of it taken, by the individuals, who compose the body corporate: added to which *Fitzherbert* says expressly, that if any are disturbed, the corporation may sue. The passage is in *fol. 227. E.* And if any city or borough ought to be quit of toll for the merchandizes which they buy in another town or place, if any of them be compelled to pay toll, *all* the corporation may bring the writ by the name of their corporation, and may have an *Alias* and attachment thereupon, if need be, with these words at the end of the writ; “*Et distinctionem si quam eis ea occasione feceri, &c.*”

A passage from the Register, under title *Monstraverunt*, was thought to countenance this objection. It is the rule (for the author of the Register is a text writer, as well as a compiler of writs,) that when the attachment was to be sued, the names of the tenants were to be inserted. But this is explained by the obvious necessity of the case. In the suggestion of the writ *Homines* only are named: they are not a corporation, therefore the individuals must sue. In the present case there is a corporation, and therefore the individuals need not sue.

If indeed it be true, that there must have been an actual distress, or other positive damage to the party suing, to give ground for the suit (which the third objection goes to), this will not only fortify the second objection, but it will render it unnecessary to discuss it more particularly, or to decide upon it; for whether the corporation can or cannot be said to have sustained damage by being disquieted by a demand of toll made on some individuals, if damage be the ground-work of the action, the damages having been remitted in this case, the ground-work of this action is gone.

But is it a principle founded in the law of *England*, or in general policy (if by that is meant the policy upon which our judicature stood in old times) that there can be no action maintained without damage, in the sense in which we understand damage in personal actions? I consider it as a subordinate question whether that particular damage which arises from actual distress, is essential to the support of this particular action by writ of *De effendo quietum de theolonio*.

We must not enter upon the examination of this question with the prejudices which the established course of proceeding in the common personal actions may have created. We must look back into the history of our judicial policy at an early period. We shall

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have to consider the nature and the end of the actions founded in *right* as contradistinguished from *possession*. We shall have to consider the forms of the ancient proceedings simply, and with reference to their object and effect; and by means of that reference to distinguish between that which is form only and that which is substance: because however sacred our old forms may once have been, Your Lordships are now bound by positive law to decide in this stage of this cause, upon the very *right* of the case, to be collected from the whole of this record (if that right can be collected) stripped of all the forms with which it is clothed.

The first observation which the ancient history of our law suggests, as applicable on this occasion, is, that at the common law, in actions founded on the *right*, no damages were recoverable. Damages were first given by Stat. 20 Hen. 3. in Dower and Quarantine; other statutes have, since that time, given damages in other cases; but many remain at this day in which no damages are recoverable.

If damages were not originally recoverable; if the *right*, and the *right only* was to be recovered by the judgment of the Court; the inference seems unavoidable, that damages actually sustained could not be of the essence of the action, and that the *right alone* was essential.

The question here very naturally occurs, "What business has a man in a court of justice, who has sustained no damage, let his right be what it may?" And a second question also occurs, "Shall any man be at liberty to drag another into a court of justice, who has done him no injury?"

To the first question it may be answered, that (without controverting the truth of the proposition, considered as a general proposition and understood in a popular sense, "that no man shall prefer a complaint to a court of justice who has sustained no damage,") a man may sustain damage not pecuniary, nor to be recompensed by money.

An extreme jealousy prevailed formerly, respecting all matters of right: many acts entirely unproductive of actual damage, pecuniary in its nature or capable of being recompensed by money, were deemed infringements of right, damage to the right sufficient to warrant the owner in asserting the right against the party infringing it, in an action.

Our ancestors thought that the breath of *calumny* tainted men's rights; and indeed this is to a certain extent the language of our times.

times. The recovery of the right by the judgment of the Court was deemed a proper satisfaction for the damage sustained.

To the second of these questions I answer, that great care was taken that no man should come into a court of justice without having the right in him: but the protection against vexation from unfounded claims was, in the spirit of the times, by the amercent *pro falso clamore*. In a higher state of civilization, and when men's rights are better understood, and better protected, we make satisfaction to the party dragged into court and called upon to resist an unjust demand, by giving him costs.

It seems to have been the policy of former times to open the freest access to courts of justice, and to offer to all men who had right, the sanction of the judgments of the courts, for the establishment, security, and preservation of it.

If the party against whom a writ issued did not mean to contest the right, he disclaimed; and if he did not come at the very first day he was liable to an amercent, though he disclaimed. Upon the disclaimer he was not simply dismissed, but the defendant had judgment to recover the right. At this day in *Quare impedit* the bishop disclaims, that is, claims nothing but as ordinary. The judgment as to the right passes against him upon his disclaimer, and there is no inquiry whether or not he did actually interrupt the patron.

Upon examination of the different writs of right, it will be found, that almost universally, if the right was of a nature to admit of a direct interruption by the act of the party, the writ is formed upon such a supposed interruption. A distress taken in contravention of the right is one of the instances; but it is to be observed, that these writs are formularies framed for the purpose of bringing the right into discussion, like those of the *prætor*; and though in *prescriptis verbis*, from which the suitor could not depart without hazard of losing his writ, there is the most direct authority, that in many cases it was not necessary that the act of interruption supposed by the writ should have actually taken place.

Such was the form in every one of the six *Brevia anticipantia*, as Sir Edward Coke quaintly calls them. This appears by the precedents in *Rastall*, under each of those heads, and by the text of *Fitzherbert*. The matter so stated must have been mere supposal, and a mere formulary, sued to introduce the matter of right in those cases. If the writs of *Monstraverunt*, *Mefne*, and *Ne injurie vides* might be used before the distresses taken, the *Warrantia chartæ*

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before the having been impleaded, the *Audita querela* before execution taken out, and the *Curia claudenda* before any damage actually sustained for want of inclosing; of necessity the matter of form alledged could not be true. And the observation admits not of the answer given to it, that though the mandatory writ might issue, the remedial writ could not; for in some of the cases there is no such previous mandatory writ, the *Audita querela* for instance, and the *Curia claudenda*.

In the course of these proceedings it has been said, (though I think it was not much pressed in the argument at Your Lordships' bar,) that this writ *De effendo quietum de theolonio* was included in Sir Edward Coke's enumeration under the head *Monstraverunt*. I conceive that the foundation of the argument lies deeper; that in a writ the suggestion of interruption or damage is mere form; and that, whether the writ *De effendo quietum de theolonio* is a writ of *Monstraverunt* or is not, ought to weigh nothing in the argument.

But if it should be thought necessary to examine this argument, thus far at least is clear—This writ is intimately connected with the writ of *Monstraverunt*; it is confessedly of the same nature, if not the writ of *Monstraverunt*. Probably it was formed upon the writ of *Monstraverunt* under the Statute of *Weftm. 2.* which directs, that where a writ is found in one case, and none in another requiring like remedy, the clerks in the Chancery may agree on a writ, or adjourn the Plaintiff to the next parliament, when the writ would be formed under the authority of the King and his council.

I will hazard a conjecture as to the progress of this writ *De effendo quietum de theolonio* to the maturity in which it is found in the Register. Tolls are, generally speaking, derived from the crown; many of them were part of the revenues of the crown, collected by the bailiffs and officers of the crown. When the crown had granted to any description of persons to be quit of toll, or they could by law claim to be so quit, as was the case of tenants in ancient demesne; if the officers of the crown distrained them for toll, it was an obvious remedy to apply for the mandatory writ from the crown to its own officers, and this would most frequently be effectual. But when tolls were granted out, and became the private right of other subjects, the writ would not be obeyed; the grantees could not in justice be concluded by it; there must be an appeal to the law. Then, as it seems to me, was the course

of proceeding upon the writ *De effendo quietum de theobonio* devised upon the plan of a writ of *Monstraverunt*, as in *confili casu*. It is highly probable that the King's name might have been originally joined with the Plaintiff's in the suit, as was formerly the case in prohibition: but what a mere form that was, may be collected from the proceeding in prohibition going on very well at this day without it.

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If I could go farther than conjecture as to this, I should say, that this writ was a writ of *Monstraverunt* to the purpose for which Sir *Edward Coke* has mentioned that writ. Whether it ought to be so considered or not, and admitting, for the sake of the argument, that the form of this writ requires that it should be stated that the party had been distrained upon; still it may be maintained, that this is but form, and that the truth of the fact is not necessary to the support of the ground of the action, or to warrant the judgment.

A case in the Year-Books 40 Ed. 3. fo. 45. b. will maintain and illustrate this proposition. " *Candid Serjt.* demands judgment in *Monstraverunt* of the writ, because they have not declared how they were grieved, whether by distress, or otherwise, nor on what day. — *Belknap Serjt.* We have said, we brought a prohibition to you, after which you distrained us for other services and distrained the tenants. — *Kirton J.* You should have said how many beasts, *for you are to recover damages*; you should therefore declare how you are damnified. — *Thorpe Ch. J.* By their suit they are to discharge the tenancy, as in a *Ne injuncte vexes* at common law; and for demanding without more they shall have their action; and if they are not damaged it will excuse you from damages. A man shall have a writ of *Mefne*, though he be not distrained, and shall recover the acquittal *pro loco et tempore*; but he shall be discharged of the damages; and so shall the land here be discharged, and you excused from damages."

I need not observe to Your Lordships, that if doubts have at any time been entertained, whether Sir *Edward Coke*'s doctrine in *Co. Litt.* fo. 100. was founded, here is a judicial authority which goes a great way to support it. Indeed it was not likely that he should have broadly stated such an enumeration of the *Brevia anticipantia* without sufficient ground.

There was another case cited at the bar from the Year-Books, which went still further to support Sir *Edward Coke*. I may add,

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that *Fitzherbert* and Sir *H. Finch* both adopt this doctrine, as to some of these writs: and if the reason for allowing the writ of *Warrantia chartæ* to be sued out, before the party is impleaded, will support the doctrine as to that one case, I need not observe to Your Lordships how that will break in upon the whole train of reasoning for the Defendant in error. Why is a man, who has subjected himself to a warranty, to be dragged into a court of justice unnecessarily, before he has been called upon to perform his engagement; before the Plaintiff has sustained any loss? Is it just that he should be harassed by a suit which was not rendered necessary, for the mere accommodation of the Plaintiff, and to better his security? The ground which is peculiar to this writ will not bear it out. The foundation must be made broader or the edifice will fall.

If distress, supposing it to have been alleged in the count, would in a case of this nature be deemed matter of form only, Your Lordships will hardly think it necessary to enter into a critical examination of the force of the words "*require to yield toll*," and the difference between requisition and distress in this case, in which the parties have appeared, and waving all question as to the formal part of the case, have joined issue upon the right, and there have been a verdict and judgment upon it.

But let this examination be entered into. Distress, considered as the subject of a mere personal action for damages, is indeed a very different thing from claim and demand; but, considered only as it affects the mere right, it differs only in degree. Both impeach the right. And why should not a man who makes a claim against my right, be put either to support that claim, if he can, or to renounce it by disclaimer? Let it be remembered, that claim was considered by the common law of this country as a very solemn assertion of right, and was therefore as often as it interfered with the right of another, considered as a very serious attack upon that right. As a proof of the first branch of this proposition, I would remind lawyers, that claim prevented a descent from tolling an entry; and they will also recollect the effect of non-claim in fines, and many other less solemn cases. For the latter branch they will find a writ of right grounded altogether upon the adversary's having made a claim. I allude to the writ of *Quo jure*.

I will give Your Lordships the trouble of listening to *Fitzherbert's* account of the writ of (a) *Quo jure*, because I think it very apposite

to another part of the argument. "The writ of *Quo jure*—Where
 " a man hath land in fee, and another claimeth common on that
 " land, he who owneth that land shall have this writ against that
 " commoner who claimeth the common, and the writ is such.
 " *Rex vix. &c. Si A. fecerit te securum, &c. tunc summoneas, &c.*
 " *B. quod sit, &c. ostensurus quo jure exigit communiam pasturæ*
 " *in terrâ ipsius A. sicut idem A. nullam habet communiam in terrâ*
 " *ipsius B. nec idem B. servitum facit quare communiam in terrâ*
 " *ipsius A. habere debet, ut dicit; et habeas inde, &c.*"—" And
 " this writ is a writ of right in its nature; for when the Plaintiff
 " hath declared in this writ, the tenant shall make defence and
 " set out his title to the common, and allege seisin thereof,
 " and the *esplees, et quod tale sit jus suum, offert, &c.* as the de-
 " mandant shall do in a writ of right: and then the Plaintiff in
 " the *Quo jure* shall make defence and deny the seisin alleged by
 " the Defendant, *and join the mise upon the mere right, or by*
 " *battail.*"

Your Lordships perceive, that the only matter of complaint suggested in the writ was, that the party *claimed a right of common*. But *Fitzherbert's* account of what was to be done upon this writ goes to the very foundation of this third objection. It plainly evinces, that the suggestion of the writ was mere form on which nothing turned. The tenant was to set out his title; the plaintiff was to deny a seisin and join the mise upon the *mere right*. To claim liberties and franchises without right was usurpation upon the crown. The writ of *Quo warranto* proceeds upon claim. Claim was always one of the legal modes in which rights were asserted in courts of justice. Franchises were formerly claimed in the *Iter*, they are now claimed in the *Exchequer*. The writ *De libertatis allocandis* issued upon claim made to the justices. *Fitz.* 229. B. Your Lordships will recollect, that the most solemn assertion of right, which the history of this country can furnish, was by *claim.(a)*

The precedents of writs in the Register are frequently "*quare*
disfrinxit." but there are several forms of writs in the Register under the title *Monstraverunt*, and other titles, where the suggestion is "*quod exigit.*" In *Monstraverunt* the party is com-

(a) His Lordship probably alluded to the words in the declaration of right recited in *1 Will. & Mary, Sess. 2. c. 2. viz.* "and they

" do *claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties.*"

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manded *quod non exigat*; he is required to shew *quare exigit*. There are also under title *De effendo quietum de theolonio* some writs in which there is no suggestion of a distress. I ought not to omit mentioning, that there are to be found in *Rastal* precedents of issues joined upon the fact of interruption suggested in these writs, I believe, the fact of the taking a distress. But, in those instances, there being no denial of the right, the party had judgment to recover the right. Probably it will be found that those issues were offered in cases whereby statutory damages might be recovered as well as the right, and that they were offered to protect the party from the damages. However understood, they make a clear distinction between the right and the accidental pecuniary damages sustained in respect of it.

And therefore, neither upon the reason or policy of the law, the nature of the remedy, authority in law, or upon precedent, can it be maintained, that the action does not lie, or that the count is bad, because no actual distress has been taken or even stated to have been taken.

The fourth objection remains to be considered.

The ground-work of this objection is, that the prescription to be quit of toll does not extend to mere freemen, non-residents, not householders, and not paying scot and lot (a). If this were so, how is the objection upon this record to be shaped? Is it an objection in law to the prescription as laid? or is it the objection that the individual citizens of whom toll has been demanded, are not brought within the prescription as laid? There is no opening for the objection in either way upon this record.

The strongest way of putting it (if the act of parliament for confirming the customs, &c. of the city does not stand in the way) is, as an objection to the prescription as laid, because the verdict would be no protection against an objection so stated; and the particular ground of objection would be, that a prescription for all citizens without restriction or qualification is unreasonable and void. But if Sir Edward Coke's opinion, as stated by *Bulstrode*, is well-founded, that a citizen without residence is not in judgment of law *civis*, then the *cives* in the prescription must mean citizens resident; and the averment that the several persons of whom toll

(a) In a subsequent case of *The Corporation of London v. The Corporation of Liverpool*, which was tried at bar in the Court of Exchequer in Easter Term 1799,

the jury, under the direction of the Court, found that a freeman of *London* is not exempt from toll, unless he be resident, inhabitant, and in scot and lot.

was demanded were *cives*, is tantamount to an averment that they were citizens resident, which removes all objection.

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If *civis* is in judgment of law a mere general term, we have not heard upon what grounds of law it is to be argued without the assistance of facts which are not upon this record, that the prescription cannot extend to citizens in the largest sense of the word which the law will adopt. It must be first accurately defined what is a citizen; and then it would be to be considered, whether all persons of that description were in judgment of law capable of taking the benefit of the prescription; and that must be resolved in the negative, before the objection to the prescription as laid, could arise; all which may perhaps be matter for very serious discussion hereafter. At present I shall content myself with observing, that the authorities in the case of *prisage* seem to have no necessary application to the right to be quit of tolls, except as far as they go to maintain Sir Edward Coke's position, that a citizen without residence is not in judgment of law a citizen; which, for the reason I have given, will not assist the objection to the prescription as laid.

As to the practice of selling the freedom, and consequently selling the franchise, and defrauding the crown and its grantees of their rights, it is an answer to say, that upon this record, out of which we must not travel, it does not appear, nor can we take notice, that the freedom can be sold, or that it has been sold to the persons described as citizens upon this record. The facts therefore, out of which the objection in law is to arise, are not before Your Lordships.

In this and in other respects, it seems to be a mixed consideration of fact and of law, and for inquiry by the jury what sort of citizens were to have the benefit of this prescription; as it certainly would be, whether the individuals had the qualification which the prescription required. Issues having been joined upon both points, and the jury having decided upon them, and the facts upon which they have decided not being before Your Lordships, we cannot advise Your Lordships to enter further into this fourth objection.

This attempt to revive a course of proceeding, which, if not obsolete, has certainly for a long time gone into disuse, has been the subject of some animadversion. This however may be said for it; that it has conducted the parties by a very short road indeed, if we compare this record with our modern pleadings, to issues upon what the parties understood at the time to be the very right

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right in dispute with them, free from all the embarrassments which forms and words are too apt to create. And I must say, that if these writs of right could be prosecuted without the delays in process, effaigns, &c. with which they are burthened, it would be much for the benefit of the suitors that more of them should be introduced into practice.

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Upon the whole of the case I conclude, and am now to offer to Your Lordships the unanimous opinion of the Judges, that the matter in this record was sufficient to entitle the original Plaintiff in the action to recover.

After hearing the opinion of the Judges, the House, on the motion of the Lord Chancellor, resolved, that the judgment of the Court of *King's Bench* should be reversed, and the judgment of the Court of *Common Pleas* affirmed.

May 9th.

CLIFTON v. GERRARD.

Under a covenant by a lessee of a coal-mine to pay a moiety of all such sums of money as the coals there raised shall sell for at the pit's mouth, the lessee was held liable to pay a moiety of the money which the coals, though sold elsewhere, would have produced at the pit's mouth.

Eyre J. contra.

THIS was a demurrer to a declaration in covenant, and the question was, Whether under a demise of a coal-mine at a certain yearly rent "and also one-half part or share of all such sums of money as all or any part of the cannel to be gotten by virtue of the said indenture shall sell for at the pit's mouth over and above 4d. the basket" the Plaintiff(a) was entitled to claim one-half of such sums of money as had been produced by the sale of the cannel at other places than at the pit-mouth, it being averred that the cannel, if sold at the pit-mouth, would have produced above 4d. per basket; (See the record at length upon Error, 7 Term Rep. 676.)

The opinion of the Court was this day delivered by

EYRE Ch. J. We all agree that it may be collected from the whole of the deed taken together, upon which this action is brought, that it was intended that a proportion of the profit upon all coals, not being refuse coals, which should be raised from the collieries demised, should go to the lessor, the owner of these collieries. The question between us has been, whether the parties have used the proper and effective means to carry this intention into execution? The stipulation is, that the lessor shall receive a certain proportion of the price which the coals raised shall sell for at the pit's mouth. Probably all the coals raised were, at the time when

(a) There were originally two Plaintiffs, but the death of one was suggested on record before judgment.

this

this lease was made, sold by those who raised them at the pit's mouth, and as long as they continued to be so sold, the provision for securing to the lessor his proportion of the profits would be sufficient. In point of fact, large quantities of the coals raised have for some years past not been sold at the pit's mouth, but have been sold at other places by those who raised them. My Brothers are of opinion, that the change of circumstances should not be allowed to defeat the intent of the deed, and that to effectuate that intent the words "shall be sold at the pit's mouth" may be construed to mean "shall be worth to be sold at the pit's mouth," and I agree with them in thinking, that if the words were capable of that construction, there might be an averment what the coals were worth to be sold at the pit's mouth, and that the proportion of the profit to be rendered to the lessor might in that manner be ascertained, and that this would support the present action. The point upon which I differ from my Brothers is this: I am apprehensive that the words "shall sell for at the pit's mouth" will not bear out the construction which is put upon them. I am quite satisfied that the parties did not mean to use them in such a sense, but on the contrary, they used them in their plain and obvious sense, in which the terms of the covenant are adapted to that mode of selling the coals raised which prevailed when the lease was made. I believe the substantial justice of the case will be reached by the opinion which my Brothers have formed upon this deed, and I can only add, that I am sorry I cannot satisfy myself to subscribe to it.

Per Curiam,

Judgment for the Plaintiff. (a)

(a) This judgment was reversed upon error in the *King's Bench*. See 7 T. R. 676.

CURRY v. WALTER.

THIS was an action for printing and publishing in the newspaper called "The Times," under the title of "Law Reports," a libel on the Plaintiff. It imported to be an account of an application to the Court of *King's Bench* for an information against the Plaintiff and a Mr. *Bingham*, both justices of the peace for *Hampshire*, for refusing to license an inn at *Gosport*.

The ground of the application, as moved by Mr. *Erskine*, was that the magistrates had conspired with the landlord of the inn-

matter of justification ought not to be pleaded ?
keeper

7 Ed. 3, 564.
2 Campb. 568.

An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual. Quare,
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keeper to find a pretence for refusing him a licence, thereby to compel him to surrender a very beneficial lease to his landlord. The supposed libel, which was set out *verbatim* in the declaration, stated the circumstances of this charge very distinctly, and concluded by shewing that the rule was not granted, because there was no affidavit on the part of the prosecutor of the magistrates having had due notice of the motion. The Defendant pleaded the general issue, and at the trial, after the Plaintiff had proved the publication of the paper in question by him, produced as witness a person whom he employed to collect legal intelligence for the use of his paper, in order to prove that the report was a true and faithful account of what passed in the Court of *King's Bench* upon the motion. It was objected on the other side, that this defence ought to have been put upon the record, and could not be given in evidence under the general issue. This objection however was overruled by *Eyre Ch. Just.*, who in summing up, told the Jury, that though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion, that being a true account of what took place in a court of justice which is open to all the world, the publication of it was not unlawful. The Jury found a verdict for the Defendant.

A rule *Nisi* for setting aside this verdict having been obtained on a former day, upon two grounds, 1st, That the matter given in evidence did not amount to a defence in law; and 2dly, That supposing it to be a good defence it ought to have been pleaded in bar to the action, and not received in evidence under the general issue;

Le Blanc Serjt. now shewed cause. There are two points to be considered: First, whether the Defendant was at liberty to give in evidence under the general issue, that the account of the case published was a true account? Secondly, whether at all events it is not a libel to publish what did actually pass in court, if injurious to the character of the Plaintiff? It may be admitted, that a Defendant cannot justify an assertion on the ground of its being true, without specially pleading such justification. But in this case the libel was not justified as true, but evidence was merely called to shew that the account published in *The Times* was a true account of what passed in the *King's Bench*. Many cases may be cited to shew that the Defendant is entitled to prove the occasion of speaking particular words. As in the case of giving the character of a servant; which was so ruled by *Lord Mansfield* at *Nisi*

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Prius (a). Or if a man repeat an injurious assertion expressing his concern of its having been made by another, and without any intention of doing an injury himself (b). In *Cro. Jac.* 90. a cause is cited of a clergyman, who in his sermon quoted a passage from *Fox's Book of Martyrs*, scandalizing a person then present; on action brought against him, and the general issue pleaded, he gave the matter in evidence, and it was held that "it being delivered "but as a story and not with any malice or intention to slander "any, he was not guilty of the words maliciously." So it is not actionable for one to tell another confidentially not to trust a tradesman: for it is only by way of counsel. *Vanspike v. Cleyson*, *Cro. Eliz.* 541. The same doctrine was laid down by *Pratt*, Ch.J. in the cause of *Herve v. Dawson*, Sittings after Term, 5 Geo. 3. C. B. Bull. N.P. p. 8. edit. 2. If the account published by the Defendant be a libel, no man can report a cause decided in a court of justice reflecting upon the character of another. Supposing the facts contained in the affidavits on which the motion in the King's Bench was founded to be false, the deponents are liable to be indicted. A counsel is justified in stating what appears in his instructions, but he must not go out of his (c) way to vilify. In this transaction nothing of that kind appeared. The Defendant therefore might lawfully report what the counsel might lawfully say.

Adair and Marshall Serjeants contrad. 1st, The matters given in evidence did not amount to a defence in law. 2dly, If they did, they ought to have been pleaded. It may be admitted, that the parties, counsel and witnesses in a cause are exempt from an action of slander, provided the allegations be made in a court of competent jurisdiction, and be pertinent to the cause, *Waterer v. Freeman*, Hob. 266; *Weston v. Dobniet*, *Cro. Jac.* 432.; and *Affley v. Younge*, 2 Burr. 807. It has been held, that *scandalum magnatum* would not lie for bringing an unfounded charge of forgery against a peer, because the charge was exhibited in a court of justice. *Lord Beauchamp v. Sir R. Croft*, *Dy.* 285. a. For the same reason an action will not lie for a false charge before a justice of the peace. *Ram v. Lamley*, *Hut.* 113. and *per cur.* *Cro. Jac.* 432. or for a false charge in a plea. *Ibid.* So no action lies against a witness for a false charge. *Harding v. Bodman*, *Hutt.* 11. *Brownl.* 2. S. C. and *Buckley v. Wood*, *Cro. Eliz.* 230. So a counsel is not liable for false and injurious words, though not precisely pertinent to the issue, if they were in mitigation of damages, and

(a) *Edmondson v. Stevenson* 1^o Ux. Sitt. was expressly recognized in *Weatherford v. Wthm.* after A. 6 Geo. 3. C. B. Bull. N.P. *Hawkins*, 1 Term Rep. 110.
p. 8. ed. 2. The doctrine of the above case (b) 1 *Loo.* 82.
(c) *Broad v. Montague*, *Cro. Jac.* 90.

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he spoke them by instruction of his client. *Brooke v. Montague*, 1 *Roll. Ab.* 87. The reason of the privilege in the above cases is that the suit is legal, though the foundation of it is false; and Lord Coke says, 4 *Rep.* 14, b. "If actions should be permitted in such cases, those who have just cause of complaint would not dare to complain for fear of infinite vexation." Besides "there can be no scandal if the allegation be material, and if it is not, the Court before whom the indignity is committed by immaterial scandal, may order satisfaction and expunge it out of the record, if it be upon the record." *Per Lord Mansfield*, 2 *Burr.* 810. This privilege however being *ex necessitate* has always been construed strictly and confined to the above cases. If a man exhibit a false charge in a court which has no jurisdiction, as felony in the Star-Chamber, *Buckley v. Wood*, 4 *Co.* 14, b. *Cro. Eliz.* 230. S. C. and *Hob.* 267. or an appeal of murder in the *Common Pleas*, 4 *Co.* 15. It is actionable. It appears also that a false charge, though made in a court of competent jurisdiction, if talked of elsewhere at large is libellous, 4 *Co.* 14, b. (a) and Justice Crook's case, *March.* 76 (b), and this has been expressly held of a petition to the King containing slanderous matter. *Hare v. Miller*, 3 *Leon.* 138. and of a petition to the *House of Commons*. *Lake v. King*, 1 *Saund.* 132. (c) 1 *Lev.* 240. S. C. 1 *Sid.* 241. S. C. and of the publication of proceedings in prohibition. *Waterfield v. The Bishop of Chichester* (d), 2 *Mod.* 118. Lord Mansfield often mentioned that Lord Hardwicke granted an attachment against an attorney who published his brief after the trial of a cause, deeming it a libel. There was also an action in this court against the present Defendant, for publishing an account of a trial in the *King's Bench* before Lord Kenyon, in which some severe animadversions made by his Lordship upon the Plaintiff were set forth; and Lord Loughborough, before whom it was tried, held it a libel, and a verdict was found for the Plaintiff. The late case of *The King v. Lord Abingdon*, *Esp. N. P. Cas.* 226. is an authority on this point. There it was held that a publication by the Defendant of a speech which he had made in the *House of Lords* containing slanderous matter, was a libel. The only distinction that can be taken between the cases, is, that the present Defendant is not as the Defendant in that case was personally interested in, or party to the original scandal, and therefore no malice can be inferred

(a) Sed quare, if that case warrants this deduction?

(b) *Vid. etiam Rex v. Salisbury*, 1 *Lord Raym.* 341.

(c) In the notes on this case by Mr. Serjt. Williams in his late learned edition of *Sau-*

ders, both the points insisted on by *Addair* and *Marshall* Serjts. are very fully discussed.

(d) *Sed vide* what is laid of this case by Lawrence J. 8 *Term Rep.* 297., who shows that the charge against *Waterfield* was for publishing a false account of the proceedings whereon

whereon to found a criminal prosecution. But this will not deprive him of his civil remedy; for in a declaration for slander *falso dixit* without *malitiosa* has been held sufficient. *Mercer v. Sparkes*, *Ow. 51. Noy 35. S.C. and Moor 459. Anon.* Copying a scandalous matter is according to Lord *Holt* sufficient to constitute a libel, for it perpetuates the memory of the scandal; though if the copy be made by a clerk in writing an indictment, or a student a note, it is not so, because not done *ad infamiam*. *Rex v. Beare*, *1 Ld. Raym. 417. 2 Salk. 417. 12 Mod. 220.* It is now perfectly settled that every one is answerable for the slander which he reports of another. *Per (a) Lee Ch. J. G. Hall 1751. Bull. N.P. 10. Ed. 2.*

With respect to the second point, it will be necessary to consider the allegation in the declaration. The libel purports to be an account of what passed in the Court of *King's Bench*, and it was not stated that the Plaintiff and Mr. *Bingham* did what was there ascribed to them, but that certain things were there ascribed to them. The truth of this account therefore, not the truth of the facts stated, should have been specially pleaded in justification: The general issue is either a denial of the publication, or that if published by the Defendant, the words are not actionable. The rule is, that where the Defendant admits the publication, and that the words are slanderous, but means to justify under the occasion of their publication, he should plead that justification specially, in order that the Plaintiff may have notice of the nature of the defence. *Underwood v. Parks*, *2 Str. 1200.* This was done in *Brook v. Montague*, cited on the other side, where the Defendant pleaded that he spoke the words imputed to him as *counsel*, and in *Affley v. Younge*, that the scandalous matter was contained in an affidavit made by the Defendant in the *King's Bench* in his own defence. The present differs materially from the cases relied on, viz. of a mistress giving in evidence her being called on for a character of a servant, and of a friend having spoken of a tradesman's credit by way of advice; in those cases the parties uttering the imputed scandal had a duty to fulfil, which this Defendant had not.

The Court were of opinion that this action could not be maintained, but some doubts being entertained upon the bench whether the matter of justification ought not to have been pleaded, the cause stood over; and no judgment was ever given. (b)

(a) *Vid. etiam Davis v. Lewis*, *7 Term.* by *Lawrence J.* in his judgment on the *Rep. 17.* case of *The King v. Wright*, *8 Term. Rep. 298.*

(b) See the reference to this case made

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REGULÆ GENERALES.

IT IS ORDERED, That from and after the last day of this present Term, no fines which shall appear to have been acknowledged more than twelve calendar months, shall be permitted to pass the *King's Silver Office* without a rule of the Court, or an order under the hand of the Lord Chief Justice or some other Judge of this Court; and that where the conuzor or conuzors shall be all living at the time of making the application for such rule or order, an affidavit shall be made thereof. And in case any or either of the conuzors of such fine should not then be living, an affidavit shall be made stating the time of the death of such conuzor or conuzors, and the application in such case for a rule or order that the said fine may pass the *King's Silver Office* shall be made to the Court by motion, if in Term time, or if in Vacation to the Lord Chief Justice or some other of the Justices of this court, at his chambers; and that the rule or order in such last-mentioned case, when obtained, shall be filed with the *præcipe* and concord of the fine, at the *King's Silver Office*.

By the Court,

J. A. EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

IT IS ORDERED, That from and after the first day of the next Term, in all actions requiring bail, the Defendant shall not be permitted to enter into the recognizance; but the bail shall each of them enter into a recognizance of double the sum sworn to.

By the Court,

J. A. EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

In this term *Samuel Shepherd* of the *Inner Temple*, Esq., was called to the honourable degree of Serjeant at Law, and gave rings with this motto,

“ *Legibus Emendes.*”

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Trinity Term,

In the Thirty-sixth Year of the Reign of George III.

Doe on the several demises of POTTER and Others v. ~~June 1st.~~
ARCHER and Another.

THIS ejectment, for certain premises in the parish of *Tottenham* in the county of *Middlesex*, came on to be tried before *Eyre Ch. J.* at the fittings after *Hilary Term 1796*, when a verdict was found for the Plaintiff, subject to the opinion of the Court, upon the following case: —

Francis Bowyer being seized of the tenements and premises in the declaration mentioned, in his demesne as of fee, by his will, dated the 21st of *January 1779*, duly executed and attested as the law requires for passing real estates, devised the said tenements and premises unto his nephew *Thomas Bower* for his life; remainder to *Thomas Elde, Stephen Martin Leake, and William Whitaker*, in trust to preserve contingent remainders; remainder to *Thomas Bowyer Bower* (the son of *Thomas Bower*,) for his life, remainder to the heirs male of the body of *Thomas Bowyer Bower*, remainder to the younger children of the said *Thomas Bower*, and remainder to the right heirs of *Thomas Bower* for

Tenant for life leases premises for 21 years, and before the expiration of that term dies; the trustees of the remainder make them an infant, continue to receive the rent reserved, and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the

lesee; and in the covenant against incumbrances, that lease is excepted; the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved; held that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease.

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ever. The said testator afterwards died without revoking or altering his said will, so seized of the said tenements and premises with the appurtenances; by virtue whereof the said *Thomas Bower* entered and became seized of the said tenements for his life. And being so seized by indenture of lease, made on the 25th of September 1784, between the said *Thomas Bower* of the one part, and *Thomas Archer*, since deceased, of the other part, and bearing date the same 25th September 1784, the said *Thomas Bower* demised unto the said *Thomas Archer*, his executors, administrators, and assigns, the said tenements and premises, to hold the same unto the said *Thomas Archer*, his executors, administrators, and assigns, from the feast of St. Michael the Archangel next ensuing the date thereof, for the term of twenty-one years then next following, at the yearly rent of 90l., payable half yearly, as therein mentioned; by virtue whereof the said *Thomas Archer* entered and was possessed thereof. In the month of January in the year 1790, *Thomas Bower*, the landlord, died, leaving *Thomas Bowyer Bower*, his son, then an infant; and the said trustees named in the said will received the half year's rent from the said *Thomas Archer*, which became due at *Lady-day* 1790, according to the terms of the said lease, and continued to receive the same rent, as reserved by the lease, half yearly, until *Michaelmas* 1792, at which time the said *Thomas Bowyer Bower* (having attained his age of 21 years in the month of April in the same year; and having previously, and after he came of age, suffered a recovery thereof, and declared it to the use of himself in fee,) sold the said premises to *Samuel Potter* by public auction. In the conditions of sale by which the premises were sold to the said *Samuel Potter*, it was declared that the sale was subject to the said lease to the said *Thomas Archer*, and the conveyance to the purchaser was by indentures of lease and release, dated and made respectively on the 20th and 21st November 1792. The release of three parts, between *Thomas Bowyer Bower* of the first part, *Thomas Smith* Esq. of the second part, and *Samuel Potter*, linen-draper, of the third part; after reciting that the said *Thomas Bowyer Bower*, on the 6th July last, did cause the messuage or tenement and farm aforesaid, with the appurtenances, to be put up to sale by public auction at *Garraway's*, subject to the lease therein after mentioned, and to a fee farm or quit rent of 2*l*. 10*s*. payable thereout to the said *Thomas Smith*, as lord of the manor of *Tottenham*; that at such sale the said *Samuel Potter* bid for, and being the highest bidder,

bidder, was declared the purchaser thereof (*subject as aforesaid*), at the price of 3,220*l.* exclusive of the timber, which was to be taken at a fair valuation; and that the timber had since been valued at 146*l.* 5*s.* 2*d.* and that Mr. Potter had also agreed with Mr. Smith for the purchase of the fee-farm rent for 75*l.*; witnessed, that in consideration of the purchase monies paid in manner therein mentioned, the said *Thomas Bowyer Bower* and *Thomas Smith* did convey the said meffluage or tenement and farm, and the said quit-rent by the description therein mentioned; *all which said premises were then in the tenure or occupation of Thomas Archer or his assigns, at and under the yearly rent of 90*l.*; and were under lease to him for a term of 21 years, which would expire at Michaelmas day 1805,* together with the appurtenances, to hold the same unto and to the use of the said *Samuel Potter*, his heirs and assigns, for ever, discharged of the said quit-rent of 2*l.* 10*s.* Mr. *Bowyer Bower*, by the said indenture, also entered into the usual covenants of a seller; and in the covenant for peaceable enjoyment, the rents and profits were to be received by the purchaser from the 29th *September* then last; and in the covenant against incumbrances, *the said lease to the said Thomas Archer, for the term of 21 years, which would expire at Michaelmas 1805, was excepted.* By indentures of lease and release, dated and made on the 22d and 23d *November 1792*, the above premises were mortgaged by the said *Samuel Potter* to *Benjamin Fuller, Matthew Hancock, and Richard Shaw, Esqrs.* for securing 2000*l.* and interest; and in the description of the parcels, and the covenant against incumbrances there was the *like notice taken of the lease to the said Thomas Archer as in the conveyance to the said Samuel Potter.* The abovementioned mortgagees have been in receipt of the rents ever since their mortgage, and have received the same of *Thomas Archer* the lessee half-yearly at *Lady-day* and *Michaelmas* down to *Michaelmas 1793.* The Defendants are the personal representatives of the said *Thomas Archer* deceased, and as such are in the possession of the premises. On the 24th day of *March 1795*, a notice subscribed by the lessors of the Plaintiff, *Richard Shaw, Samuel Potter, Benjamin Fuller, and Matthew Hancock*, was served on the Defendants, by which notice they were required to deliver up the possession of the said premises on the 29th day of *September* then next. Under these circumstances, the question reserved for the consideration of the Court was, Whether the Plaintiff was entitled to recover possession of the said premises? And if the Court should be of opinion, that he

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was, then the verdict to stand, and judgment to be entered thereon for him; but if the Court should be of opinion that the Plaintiff was not entitled to recover, then a nonsuit to be entered.

Heywood Serjt. for the Plaintiffs. It has been repeatedly decided, that where tenant for life leases for a term, the lease expires with his life. *Doe v. Butcher*, Doug. 51. *Roe v. Ward*, 1 H. Bl. 97. If the Defendants mean to rely on the recitals in the indentures, the case in *Bendloe's Reports*(a), pl. 13. may be referred to, where it was held, that a lease which had been forfeited to the crown, could not be set up by a reference to such lease, in another lease from the crown, to a third person, to commence from the expiration of the term of years for which the forfeited lease was granted.

Williams Serjt. for the Defendants. I admit the doctrine laid down in the cases cited from *Douglas* and 1 *H. Blackstone*, but I contend, that it is not necessary to the creation of a lease, that the lessee should be a party to the instrument by which it is created. If one grant a lease to *A.* by deed poll, *A.* will not be a party to the deed. The release of November 1792 amounts to a new grant; for after reciting the sale of the premises, and the reservation of the fee-farm rent, it witnesses that in consideration of the purchase money, the vendor conveyed subject to the lease of the Defendant. The lease therefore is not merely mentioned in the recital, but in the operative part of the deed: and the party by the express terms of it took a new lease, to run from the date of the deed to *Michaelmas* 1805. The vendor and vendee both meant the lease to have existence, and the latter taking, subject to the lease, paid for the premises accordingly. If this was the intent, the words amount to a new grant. Besides, *Potter* has concluded himself from entering upon *Archer* by his acceptance of the deed, and if he cannot enter he can maintain no ejectment. Now if *Potter* can maintain no ejectment, neither can the mortgagees, for the mortgage deed also notices the lease. In *Goodright v. Strathan*, Doug. 54. note [17] and Coup. 201. S. C. a lease void in its commencement, was held to be set up as a new lease by subsequent circumstances.

The Court were of opinion, that the Plaintiff was entitled to recover, and *Buller* J. observed, that although a person might take a future interest as remainder-man, under a clause contained in an

(a) The case is to be found in that part of *Bendloe's Reports* which follows some cases reported by Justice *Dallifor*, and all in N. *Bendloe*, pl. 150. p. 38.

indenture to which he was no party, yet that it did not follow that a present interest could be so taken. (a)

Per Curiam,

Judgment for the Plaintiff.

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(a) In *Co. Litt. 231. a.* is the following passage to the same effect. " And albeit, " he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life) yet when he in the remainder entereth and agreeeth to have the lands by force of the indenture, he is bound to perform the conditions contained in the indenture. And here is also a diversitie to be understood, that any estranger to the indenture may take by way of remainder, but he cannot in this case take any present estate

" in possession, because he is an estranger to the deed." So in *Gibby v. Copley*, 3 *Lev.* 139. the same doctrine is laid down by *Levins Justice*, who says, " est un common erudition que un que n'est party à un fait inter parties ne peut prendre per un fait nisi per voy de remainder;" and he cites *Cooker v. Child*, which is to be found 2 *Lev. 74.* Lord Holt also in *Salter v. Kidgley*, *Cartb. 77.* held, " that one party to a dead could not covenant with another who was no party, but a mere stranger to it."

BLYTH v. HARRISON.

June 4th.

THE Defendant in this action was arrested by the Sheriff of Lincolnshire on a writ returnable in Hilary Term 1796, and detained in custody; on the 20th of April in Easter Term, a declaration was entered in the Prothonotary's Office, and a rule to plead given, but no copy of the declaration was delivered either to the prisoner or his gaoler till the 10th of May, which was the day after Easter Term expired. The Defendant conceiving that the Plaintiff was bound not only to enter the declaration, but to deliver a copy of it within the Term, and that without such delivery, he could not be said to have declared, took out a summons for a *superfedeas* before *Buller J.*, who directed him to make his application to the Court. Accordingly a rule *Nisi* having been obtained for his discharge:

Le Blanc Serjt. now shewed cause, and contended that though by the rule of this Court, E. 5 W. & M. Reg. 3. a prisoner be entitled to his *superfedeas* unless the declaration be entered in the office before the end of the Term next after that in which the process is returnable, yet that the copy of the declaration is not required by that or any other rule to be delivered to the prisoner within the Term; that the 6th section of the rule allows the Plaintiff ten days after Easter, and twenty days after every other Term, to file his affidavit of the delivery of the copy, either of which periods is more than sufficient for the purpose of filing the affidavit, and was therefore certainly allowed that the Plaintiff

A prisoner in custody on mesme process, is super-
sedable, unless a copy of the decla-
ration be delivered before the end
of the Term after the process is re-
turnable.

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might have time to deliver the copy of the declaration after the expiration of the Term; that if this application should be granted, a Plaintiff might be obliged to declare some time before the second Term is expired (till the last hour of which he is entitled to delay his declaration), for wherever the prisoner should be in the custody of a sheriff of a distant county, it would be necessary that the declaration should be filed some days before, in order that the copy might be sent into the country and delivered in due time. He trusted therefore, that the Court would not abridge the Plaintiff of any portion of his privilege.

Runnington Serjt. in support of the rule, relied upon the established practice of the Court, and upon the statute 4 & 5 W. & M. c. 21. s. 2. which he contended was compulsory on the Plaintiff as to the delivery of the copy of the declaration within the second Term, that being the time appointed not only for declaring, but also for delivering the copy, according to the true construction of the statute: that if it were otherwise, great inconvenience would ensue, no other time being limited for the delivery of the copy, at least till the ten days allowed for filing the affidavit had elapsed: That the prisoner had no other means of knowing that the declaration had been entered at the office, and could therefore take no steps to obtain his *superfedeas*, even where the Plaintiff had neglected to declare within the Term. He urged also, that the delivery of the declaration was the most essential part of declaring, *Strickland v. Hodgson, Cooke's Caf. Prac.* 114., and that the Defendant could not otherwise know what to plead.

The Court entertaining some doubt on the effect of the rule of E. 5 W. & M. s. 6. took time to consider: And on this day the unanimous opinion of the Court was delivered by

EYRE Ch. J. This will be found to be a question upon the construction of the statute 4 & 5 W. & M. c. 21. rather than of the rule referred to. That act is entitled an act for delivering declarations to prisoners. It recites, that by the course of practice in the respective Courts at *Westminster*, after the Plaintiff in any writ had been at great charge to arrest a Defendant, which Defendant, for want of bail, had been committed to gaol, unless the Plaintiff should, before the end of two Terms next after the arrest, cause the Defendant by writ of *Habeas Corpus* to be removed, to be charged in Court with a declaration, such prisoner should upon common bail or appearance, by attorney, be discharged. It therefore provides, that if a person be taken or charged in custody at the

the suit of another, upon any writ out of the Courts at *Westminster*, and imprisoned or detained in prison for want of sureties for his appearance to the same, the Plaintiff shall and may by virtue of that act, before the end of the next Term after the writ shall be returnable, *declare against such prisoner* in the court out of which the writ shall issue, and shall or may cause a true copy thereof to be delivered to such prisoner or to the gaoler; to which declaration the prisoner shall appear and plead, and if he does not, the Plaintiff shall have judgment in such manner as if the prisoner had appeared in the said court, and refused to answer or plead to such declaration. Here is a new mode of declaring against a prisoner substituted in the room of the old course, which was to bring him up and charge him with a declaration. The new mode is declaring in court, and delivering a copy of the declaration to the prisoner or gaoler; as to the time, there is in effect no alteration. By the old course, they were to bring up the prisoner to charge him within two Terms; in the new mode they are to declare, &c. before the end of the next Term after the writ shall be returnable. The statute goes no further than to direct in general terms, that the prisoner shall appear and plead to this declaration, and in default the Plaintiff is to have judgment as if the prisoner had appeared and had refused to answer or plead. The prisoner is to appear and plead *according to the course of the court*. The effect of this branch of the statute is simply to establish, that in this form the Plaintiff is to declare, that this shall be the declaration to which the prisoner shall appear and plead. The course of the court, as to the prisoner appearing and pleading, is governed by practice, and by several rules, and amongst others, by a rule of *Easter Term 5 W. & M. Reg. 3.*; which (after providing that the copy of the declaration shall not be delivered to the prisoner before the return of the process) provides that no rule shall be given for the Defendant in custody to appear and plead to any declaration, until an affidavit be filed with the proper seconday of the *delivery of the copy of such declaration*, and of the time when, and the person to whom the same copy was delivered. The filing of this affidavit, and delivery of the copy, were first introduced here for a purpose collateral to the mode of declaring. Then follows the rule, that if the declaration be not entered or left in the office before the end of the next Term after the writ be returnable, and affidavit made and filed in manner aforesaid, before the end of twenty days after such Term (*Easter Term excepted*, and within

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within ten days after *Easter Term*) the prisoner shall be discharged upon the entering of his appearance with the proper officer, by writ of *superfedeas*, according to the ancient practice of this Court. This rule adds a new term to the rule for declaring as laid down by the statute : by the statute they were to declare and leave a copy before the end of the next Term, now they are also to file the affidavit of the delivery of the copy within a limited time. If they do not declare and leave a copy within the time limited, the prisoner is superfedeable. In the present case the Plaintiff has declared in time, and has filed his affidavit in time, but he has not left a copy in time. The 8 & 9 Will. 3. c. 27, s. 13. which respects prisoners in the *Fleet*, was probably made in consequence of a doubt whether the former statute extended to them, and provides that it shall be lawful for any person after filing or entering a declaration with the proper officer, to deliver a copy of such declaration to the defendant, or to the officer of the *Fleet*, and, after rule given thereupon, to be out in eight days at most after delivery of the copy, and affidavit made of the delivery, to sign judgment, as if the defendant had been actually charged at the bar with the action. Here filing and entering the declaration with the proper officer, and delivering the copy, is made sufficient, and from hence we may collect, that declaring in the statute 4 & 5 W. & M. and filing or entering the declaration with the proper officer in this statute mean the same thing ; and to both is superadded delivering a copy, as that which shall be tantamount to the ancient mode of charging with a declaration. In the rule of *Easter*, 8 Geo. i. which respects the declaring against prisoners who have surrendered in discharge of their bail, and provides that the Defendant shall be entitled to his *superfedeas*, unless the Plaintiff shall declare against the Defendant within two Terms after the render, the language is simply, " *shall declare* ;" but this includes filing or entering the declaration and delivering the copy. This may be collected from the case of *Clavey and Walls*, 2 Bl. 786. where the Court ordered a *superfedeas*, because the declaration was not delivered to the party himself or to the turnkey in time. That was a strong case, for the declaration had been delivered in time to the Defendant's attorney, the Defendant having put in special bail by attorney, and afterwards surrendered. Respecting detainers of prisoners in the *Fleet*, it is ordered by another rule, that *no copy of a declaration delivered at the Fleet prison against any person there shall be a sufficient charge to hold such prisoner*

prisoner to bail, or to detain such prisoner for want of bail, unless an affidavit to hold to bail is made and filed, and an indorsement made by the prothonotary upon such copy of the declaration, signifying the sum of money specified. Here the *entering* and *filling* the declaration is dropped, and the *delivery of the copy of the declaration* is considered as the essence of the declaration, though doubtless the declaration would still be to be entered in the *Prothonotary's office*. There was a case of *Prime and others v. Moore*, in *Barnes notes of practice*, p. 392, where the Court set aside the proceedings against a Defendant, who had been served with a copy of process, and had become a prisoner before declaration, the Plaintiff having entered an appearance for him according to the statute, and left a declaration in the office, and given him notice of it; the Court being of opinion, that the declaration ought to have been delivered at the *Fleet*; which is further proof, that delivery of the copy of the declaration is considered as an essential part of declaring against a prisoner. It has been thought so essential, and so much more essential than the entry of the declaration, that in *Strickland v. Hodgson*, (*Cooke's Rep.* 114. and *Barnes*, 372.) it was held, that a declaration against a prisoner in a county gaol need not be entered with the prothonotary before the delivery, but that it must, before it is filed with the secondary, which, it is said, means any time before rule to plead. But to prevent mistake, I would observe, that this case does not seem to apply to the question, what shall amount to declaring in due time? We are all therefore of opinion, that the Defendant in this case is supersedable, because the Plaintiff did not deliver a copy of the declaration before the end of the term after the process was returnable.

Per Curiam,

Rule absolute.

BOLTON v. PULLER and Others, Affignees, &c.

TROVER for two bills of exchange; one of 4000*l.* and one of 398*l.* 8*s.* 3*d.*

C. & D. also carried on a separate mercantile concern in *London*; *J. S.* having accepted bills payable at the house of *C. & D.* employed *A. B. C. & D.* to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; *A. B. C. & D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by *J. S.* were remitted by *A. B. C. & D.* to *C. & D.* upon the general account between the two houses, and before any of the acceptances of *J. S.* became due both houses failed, and *J. S.* was obliged to pay his own acceptances; held that the affigees of *C. & D.* were entitled to retain against *J. S.* the bills remitted to them by *A. B. C. & D.* Held also, that it made no difference that one of the bills remitted did not arrive in *London* till after the bankruptcy of *C. & D.* though sent by *A. B. C. & D.* before that event.

June 15th.

12 *Eas.* 323.
14 *Eas.* 594.
3 *Campb.* 303.

A. B. C. & D.
were partners in
a banking-house
at *Liverpool*, and

The

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The Defendants pleaded the general issue, and at the trial before Eyre Ch. J. at the Guildhall fittings after Michaelmas Term, 1795, a special verdict was found to the following effect: *John Bolton* was a merchant at Liverpool; *John Forbes* and *Daniel Gregory*, for some years, and until they became bankrupt, were co-partners, and carried on business as merchants in London, under the firm of *Burton, Forbes and Gregory*. On the 1st of May, 1774, *Forbes* and *Gregory* entered into partnership with one *Charles Caldwell* and one *Thomas Smith*, in the trade and business of bankers, to be carried on at Liverpool, under the firm of *Charles Caldwell* and Co. and so continued to trade till that house became bankrupt. The house at Liverpool had dealings and transactions with *Forbes* and *Gregory*, carrying on business as merchants under the firm of *Burton, Forbes and Gregory*, in London; and between the two houses in Liverpool and London, there was an open account current. *Bolton* for some years, and until the house at Liverpool became bankrupt, employed that house as his bankers; and they used to procure bills which had been accepted by him, payable at the house in London, to be there paid when they fell due. Those payments when made were carried by the house in London to their account with the house at Liverpool, and by the house at Liverpool to their account with *Bolton*. In the banking account between *Bolton* and the house at Liverpool, *Bolton* was made debtor for cash received of them, and for bills accepted by him payable at the house in London; and was credited in such account for all bills and cash paid by him into the said house. An interest account was kept between *Bolton* and the house at Liverpool, which was balanced every three months; and the latter was also allowed a profit on the said account of one-quarter per cent. on bills and cash paid, either by them or by the house in London, on their account, for the use of *Bolton*. Bills having been accepted by *Bolton* to the amount of 19,702*l.* payable at the house in London, on the 28th of February 1793, he proposed to the house at Liverpool, that they should procure the same to be paid as they fell due by the house in London, and that to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange whereof those mentioned in the declaration were parcel with his indorsement thereon; to this proposal the house at Liverpool agreed. In pursuance of this agreement, *Bolton* on the 1st of March 1793, and on other days between that day and the 16th of March in the same year, delivered to the house at Liverpool, several bills of exchange, amounting in the whole to the sum.

sum of 11,583*l.* 2*s.* 9*d.*; among these was the bill for 4000*l.* mentioned in the declaration. On the 16th of *March* 1793, he delivered to the same house other bills, with a check on that house (which they received as cash,) to the amount of 912*l.* 1*s.* 0*d.*; among these was the bill for 398*l.* 18*s.* 3*d.* also mentioned in the declaration. All these bills were the property of *Bolton*, and duly indorsed by him; the bill for 4000*l.* having also previously to the delivery been accepted by him. On the 4th *March* 1793, the bills accepted by *Bolton*, payable at the house in *London*, were by the house at *Liverpool* entered on the debit side of the account between them and *Bolton*; and the bills delivered by *Bolton* to the house at *Liverpool*, were by them carried to his credit in the same account at the times when they were respectively delivered. On the debit side of the books of the house at *Liverpool*, it appeared that *Bolton's* acceptances, amounting to 19,702*l.* 13*s.* 10*d.*, were entered thus:—“*March* 4th, 55 acceptances due in *April*, 19,702*l.* 13*s.* 10*d.*”; and on the credit side, the bills delivered to the house by *Bolton* were entered, some with the date of their delivery and the day on which they were to fall due, and somewhat with the former only. On the 2d of *March* 1793, the house at *Liverpool* remitted the above-mentioned bill for 4000*l.* together with other bills to the amount in the whole of 30,000*l.* and upwards, to the house in *London*, to be carried to the account of the house at *Liverpool*; and on the 16th of *March*, they remitted the above-mentioned bill for 398*l.* 18*s.* 3*d.* together with other bills, amounting in the whole to 8000*l.* and upwards, to be carried to the same account. This last bill for 398*l.* 18*s.* 3*d.* was received by the house in *London* on the 18th of *March* 1793. Some of the bills delivered by *Bolton* to the house at *Liverpool* were negotiated by them, and the value received to their own use. On the 28th of *February* 1793, and from thence till the bankruptcy of the house at *Liverpool*, the house in *London* was largely in advance to the house at *Liverpool*. On the 16th of *March* 1793, the house at *London* became insolvent, and on the 18th of the same month a commission of bankruptcy issued against them, under which the present Defendants were assignees. On the same day the house at *Liverpool* also became bankrupt, and a joint commission of the same date issued against *Charles Caldwell*, *Thomas Smith*, *John Forbes*, and *Daniel Gregory*, as partners in the banking-house at *Liverpool*. The house at *Liverpool* at the time of their bankruptcy was indebted to *Bolton* in the sum of 2000*l.* and upwards; and none of that parcel of bills, amounting to 19,702*l.* 13*s.* 10*d.*

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accepted by *Bolton*, payable at the house in *London*, were paid either by that house or by the house at *Liverpool*, but were paid by *Bolton* himself. The Defendants possessed themselves of the two bills in question as assignees of *Forbes* and *Gregory*, and refused to deliver them on demand.

This case was first argued in *Easter Term* last by *Williams Serjt.* for the Plaintiff, and *Heywood Serjt.* for the Defendants, and a second time in this term by *Adair Serjt.* for the former, and *Le Blanc Serjt.* for the latter.

Arguments for the Plaintiff. In the first place *Caldwell and Co.* at *Liverpool*, and *Forbes and Gregory* in *London*, are, with respect to the transactions on which this case arises, to be considered as the same persons. Secondly, the bills for which this action was brought, were appropriated by *Bolton* to the particular purpose of answering his acceptances at the house in *London*, and not paid in on the general account. Thirdly, trover is the proper form of action. First, though a separate trade was carried on by *Forbes* and *Gregory* in *London*, yet as they were also partners in the banking house at *Liverpool* they were parties to the acts of *Caldwell and Smith*, and therefore the agreement made by them with *Bolton* was the joint engagement of the four partners, and binding on them all in law. The demands of third persons on the house at *Liverpool*, cannot be affected either by the distant residence of *Forbes* and *Gregory*, or by their separate concerns. Secondly, it is settled law that the property of goods deposited with a factor and not disposed of, continues in the principal, and may (subject to the factor's lien) be recovered in trover either against him or his assignees. In the present case the Defendants have no lien; for the balance of account is in the Plaintiff's favour. *Bolton* therefore is entitled to recover, unless precluded by the preferable right of the creditors of the house in *London* to the separate estate of *Forbes and Gregory*. Admitting that the bills were remitted by the house at *Liverpool* to the house in *London* on the general account, and thereby became the separate property of the latter, still, whatever rule courts of equity may have adopted in the apportionment of the joint and separate estate to the respective creditors, it has never been held in a court of law, that an action will not lie because the thing demanded has in this manner become the several property of a single partner; for private agreements made between partners, as to their claims upon each other, cannot affect the creditors of the firm. *Wangi v. Carver*, 2 H. Bl. 235. But this is not a question between creditors of the two houses, but an action by *Bolton* for the recovery of

of specific goods. Though, therefore, the remittance of the bills might have transmuted the property to the house in *London* as against the house at *Liverpool*, it cannot have that effect as against *Bolton*. The house at *Liverpool* had it not in their power to negotiate these bills generally without a breach of their agreement. For it is to be observed, that the house at *Liverpool* were not parties to the bills which *Bolton* had accepted, payable at the house in *London*; so that these bills were not deposited with the house at *Liverpool*, to indemnify them against those acceptances (to which they were not liable) but to be applied specifically in their discharge. Herein consists the difference between this and the case of a banker who draws on his correspondent in favour of a customer, and takes bills as an indemnity. And by this it is also distinguished from the case of *Bent and another v. Puller and others*, 5 *Term Rep.* 494. In that case *Caldwell and Co.* had made themselves liable on their drafts in favour of *Bent*, and had therefore a lien on the bills deposited by him: but in the present instance they had no such lien on the bills deposited by *Bolton*, who might if he pleased have recalled them at any time before they were applied to the discharge of his acceptances. This distinction is also supported by the case *Ex parte Dumas*, 2 *Vez.* 582. 1 *Att.* 232. S. C. At all events the Plaintiff is entitled to recover the lesser bill for 398*l.* 18*s.* 3*d.*, that not having arrived in *London* till the 18th of *March*, which was two days after the failure of *Forbes and Gregory*. Thirdly, if the property of these bills be in the Plaintiff, trover is the proper remedy. Lord *Hardwicke*, indeed, in the case *Ex parte Dumas*, seems to express a doubt upon this point, because the legal property follows the *chose in action* which is assigned by the indorsement. In the present case, however, the indorsement was not intended to transfer the property at all events, but only to enable the house at *Liverpool* to apply the bills to the purpose for which they were deposited. Now that application was not made, and therefore the property of the bills remains as if they had never been indorsed. In *Bent v. Puller*, if the bills had been appropriated, trover might have been maintained for them; and in *Tooke v. Hollingworth*, 5 *Term Rep.* 215. (a), though the Court differed in opinion on the case, no objection was taken to this form of action, and judgment was given for the Plaintiff.

Arguments for the Defendants. First, the bills in question were paid in upon the general account between *Bolton* and the house at *Liverpool*. It appears from the special verdict, that during the

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intercourse between *Bolton* and that house, previous to this transaction, the bills lodged by the latter with the former were always paid to the general account. Had they ever been appropriated in this case, they would not have answered the object of that appropriation; for the bills accepted amounted to $19,702\text{l}.\ 13\text{s}.\ 10\text{d}.$ whereas those deposited amounted to $12,495\text{l}.\ 3\text{s}.\ 9\text{d}.$ only. Besides, it appears from the dates of the latter, that they were not to become due till after the acceptances, and therefore were not calculated either in amount or time to be employed specifically in their discharge. This transaction was merely a continuation of the general dealings between *Bolton* and the house at *Liverpool*. No particular account was either agreed upon or kept; had there been any such it must, as in the case *Ex parte Dumas*, have been distinguished by some characteristic title or appropriate mark. If the bills had been meant as a deposit, they would not have been indorsed by *Bolton*. They were in fact paid in with a view to swell his credit with the house at *Liverpool*, to a level with the large disbursements about to be made on his account. The bill for $398\text{l}.\ 18\text{s}.\ 3\text{d}.$ is not distinguished from that for $4000\text{l}.$; for though it was not received in *London* till after the separate bankruptcy of *Forbes* and *Gregory*, it was put into the post-office, and the postage paid, during the solvency of the house at *Liverpool*; the property, therefore, here was as effectually changed as the property of goods delivered to a carrier, which has been held to vest in the assignees of the vendor unless stopped *in transitu*. *Hafowell v. Hunt*, cit. per *Buller J.* *Tooke v. Hollingworth*, 5 T. R. 231. and *Ellis v. Hunt*, 3 Term Rep. 464. Secondly, the house in *London* was distinct from that at *Liverpool*, and the acts of the former were not binding on the latter. Indeed, the Plaintiff himself engaged the house at *Liverpool* to do a separate act by the terms of his agreement; the house in *London* being only known to him as the correspondent of that at *Liverpool*: at least it does not lie with him who has treated them as distinct, to make them responsible as one. Though the funds of the house in *London* as belonging to two of the partners in the house at *Liverpool* be liable to the Plaintiff's demand upon the latter house, yet against the assignees of *Forbes* and *Gregory* as the separate firm, this action cannot be maintained. Suppose the house in *London* to have consisted of four partners, two of whom were strangers to the house at *Liverpool*: the four would not have been liable because *Forbes* and *Gregory* were members of the latter partnership; and even if the

strangers

strangers were removed, the houses would remain equally distinct. *Forbes* and *Gregory* in their separate capacity were no parties to the agreement between *Bolton* and the house at *Liverpool*. If the latter had got the bills discounted with a third person, and sent the cash arising therefrom to *London* to answer the acceptances, such person might have returned the bills whether the acceptances were paid or not. The house at *London* stands in the place of such person, and therefore this action cannot be maintained against their assignees. The case of *Waugh v. Carver* only decides, that the private agreements of partners individually between each other, cannot affect the rights of creditors to sue them all upon the joint account. Thirdly, trover is not the proper remedy. It is immaterial whether the bills were indorsed in blank, or to the house at *Liverpool*. The object of the indorsement was to pass the property on the faith of the subsisting agreement. Had the bills been entered *short* in the account, they would then, according to the opinion of *Blackstone* J. in *Zinck v. Walker*, 2 Bl. 1156. have been only a deposit, and have remained the property of *Bolton*. In this case they were meant to be converted into cash, and therefore cannot be recalled. It has been decided, that if a man deliver money to another to buy cattle, the property of the money is in the bailee, 3 *Leon.* 38. *Anon.* So if goods be delivered to *A.* to pay a debt to *B.*, *A.* may sell them. *Bridget Clarke's Caf.*, 2 *Leon.* 30. If then the legal property passed by the indorsement, Lord *Hardwicke's* opinion in the case *Ex parte Dumas* is decisive, even though the Plaintiff be deemed to have an equitable lien; for though it cannot be recovered by the legal owner against one having an equitable lien, yet it has never been held that trover will lie against the legal owner by him who hath an equitable lien. Neither in *Tooke v. Hollingworth*, or in *Bent v. Puller*, are the bills stated to have been indorsed, nor was there any question on the nature of the remedy.

Cur. adv. vult.

On this day the opinion of the Court was delivered by *EYRE* Ch. J. (who, after stating the case, said): The question is, Whether the Plaintiff can maintain this action upon this case? For him it is urged, that the house in *London* is a house of trade, carried on by two of the partners in the banking-house at *Liverpool*; though it is admitted, that the trade carried on in *London* is the separate estate of those two partners. It is insisted, that

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the bills in their hands remained in the same state, subject to the same rules of law and equity, as would have applied to them in possession of the house at *Liverpool*; and that, having been appropriated (as it is called), or delivered to the house at *Liverpool* for a special purpose, and not having been ultimately applied to that purpose, and remaining in specie in their possession, *Bolton* would have been entitled to demand to have them delivered up to him by the banking-house at *Liverpool*, or by the assignees of that house, supposing them to have come to the hands of those assignees. I take it to be now settled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up, subject only to the lien, which the banker may have upon them for the balance of his account. On the other hand it is clear, that, if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose, for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person (a).

15 East, 436, 437. The present seems to be a middle case, and, I believe, is a new one. We must endeavour to ascertain to which class it belongs.

There can be no doubt, that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate, engaged in some joint concern, in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner, as if the partnership were transacting business with strangers; for instance — suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects therefore an individual partner, or a particular partnership consisting of two or more of those persons, who are partners in some larger partnership, may be considered as third

(a) *Vid. Collins v. Martin, post. 648. Hill, Term 1797.*

persons

persons in transactions, in which the general partnership may happen to be engaged with their correspondent. On the other hand it will be difficult, if not impossible, for individual partners, or for particular partnerships composed of individual partners, to shake off privity in all the transactions of the general partnership, or to avoid all the consequences of privity. Each partner is a party, as well as privy, to the transactions of the general partnership, though the general partnership is not a party to the separate transactions of the individual partners. *Forbes* and *Gregory* were therefore parties to the agreement, which *Caldwell* and *Smith* entered into with *Bolton*, and were as much bound by it as *Caldwell* and *Smith* were. And I hold, that if *Bolton* had sued the house at *Liverpool* for a breach of that agreement and had recovered, he might have taken any part of the separate estate of the house in *London* in execution, in satisfaction of his judgment. But this will not touch the question, what shall be deemed the joint property, and what the separate property of persons so circumstanced. Joint or several, *Bolton's* claim upon it in the case supposed would be equally available to him.

Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice *Heath* suggested this consideration at the close of the first argument. It is a very important consideration.

If all become bankrupts, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see, what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience, which has been adopted, restrains the separate creditor from resorting in the first instance to his debtor's share of the joint property; and also restrains the joint creditor from

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referring in the first instance to the separate property of his debtor. Bankruptcy has been called a statute execution; but if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the Chancellor, who is to take order for the distribution of the effects of a bankrupt. Under the rule the separate creditors have a right to be satisfied for their debts out of the separate property, in preference to the joint creditors (a). But what shall be deemed separate property, or what effect the claims of third persons upon that which (as between one partner and the partnership) would be separate property, are questions, which neither bankruptcy nor the rule of distribution seem to touch. The assignees stand but in the place of the bankrupts, and take the effects subject to every legal and equitable claim upon those effects. And therefore I conclude, that though bankruptcy very much alters the situation in which I have placed Mr. Bolton, in the course of the argument, as a creditor having obtained a judgment against the banking-house at *Liverpool* on the ground of this agreement; the question now made between him and the assignees of *Forbes* and *Gregory* remains undecided, and must (as it appears to me) depend on an inquiry into the effect of the priority and participation of *Forbes* and *Gregory* in the transaction between *Bolton* and the banking-house at *Liverpool*, in which they were partners.

The true nature of that transaction has been warmly disputed in the course of the argument: but it comes out to be simply this: *Bolton* paid into his banker's hands these bills on his general account for a particular purpose. This has been called an appropriation; and legal consequences are deduced from thence, as if appropriation was a technical term, or at least was used in some definite or precise sense; whereas no term in popular use can be more general, or more uncertain in its import. In truth, when I say, these bills were paid in on a general account for a particular purpose, I mean only to say, that the object which the parties had in their view was, that the bankers might be enabled to provide for the payment of Mr. *Bolton's*

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(a) This rule was adopted by Lord Chancellor *Hardwicke*, and acted upon till overturned by Lord Chancellor *Thurlow*. The subject has since been fully considered by Lord Chancellor *Loughborough*, in the case *Ex parte Elton*, 3 *Vern.* jun. 238.

but does not appear to have been altogether settled, though the inclination of his Lordship's opinion was strongly in favor of the old rule adopted by Lord *Hardwicke*. For the cases on this point see *Cook's B.L.* from page 237 to 250. *ed. 4.*

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acceptances in *London*. So far from being appropriated to any particular purpose in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. *Bolton's* credit with his bankers; and in the nature of things they could not be applied in specie to the particular purpose of paying Mr. *Bolton's* acceptances in *London*. These bills, at least the bills in question, were remitted to the house in *London* on the general account of the banking-houses. We cannot think that this was a misapplication; or that the confidence of Mr. *Bolton* was abused. It may be asked, assuming that Mr. *Bolton* considered both houses, to be in full credit, was it not the very thing he meant? was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. *Bolton's* acceptances at the house of *Forbes and Gregory*? Then what effect can the privity and participation of *Forbes and Gregory* in the agreement between *Bolton* and the banking-house have on this transaction? which, *as between the two houses, undoubtedly changed the property in these bills*; a circumstance which distinguishes this case from all the cases which have been determined on this subject, and puts it out of the reach of the principle upon which the case of *Zinck v. Walker*, and the late case of *Tooke v. Hollingworth*, in the Court of Error were determined. The privity of *Forbes and Gregory* to the transaction at *Liverpool* rather created a demand upon them to do what they did, than to take any other course; for there is no pretence to say that it was intended that a separate account of these bills should be kept by any body. The business went on in the regular channel upon the foot of the agreement, without the least imputation upon it, up to the moment of the bankruptcy, when the adverse rights of the creditors of the two houses attached.

If up to the moment of the bankruptcy nothing affected the right of *Forbes and Gregory* to hold these bills on their separate account, that right must vest in the assignees of *Forbes and Gregory* with nothing to affect it. The assignees of *Forbes and Gregory* are bound to admit that *Forbes and Gregory* knew that Mr. *Bolton's* object, and that the object of the partnership at *Liverpool* was, that by means of these bills the acceptances were to be provided for. But how were these bills to operate as means? They were to be dealt with as the banking-house thought fit to deal with them; to be negotiated, if they thought

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fit; to be discounted at *Liverpool*, if they pleased, or remitted to whom they pleased; and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them.

If then *Forbes* and *Gregory* were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; why are not *Forbes* and *Gregory* to be considered as third persons, with whom these bills have been negotiated? If they were to be so considered, this determines the class to which I said in a former part of the argument, we were to endeavour to reduce this middle case between the case of original parties to the transaction and the case of third persons holding such bills as these in the ordinary course of the negotiation of bills of exchange.

A circumstance belonging to the lesser bill of 398*l.* 18*s.* 3*d.* was taken notice of in the argument; namely, that it came to the hands of *Forbes* and *Gregory* on the day when they became bankrupt. We are of opinion, that the bill having been remitted, as far as concerned the house remitting, before the bankruptcy, and to a creditor, cannot be recalled, and must follow the fortune of the other bill.

It is a great misfortune to Mr. *Bolton* to have been so deeply concerned with these falling houses. In such cases it too often happens that heavy losses fall somewhere. The only consolation is, that it is the law of the land, and not the caprice, or even error of any man, which can ultimately decide where they shall fall.

Our opinion upon this case is, that the judgment must be for the Defendants.

Judgment for the Defendants.

In this Term, Mr. Serjt. *Cockell* and Mr. Serjt. *Shepherd* were made King's Serjeants.

END OF TRINITY TERM.

C A S E S

1796.

ARGUED AND DETERMINED

IN

THE COURTS OF COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Thirty-seventh Year of the Reign of GEORGE III.

LIGHTFOOT and Another v. TENANT.

Nov. 14th.
9 Inst, 1796.

DEBT on bond. The Defendant prayed *Oyer* of the bond and condition; and then pleaded *non est factum*, and five other pleas, stating the bond to have been given on an illegal consideration, on all of which issues were joined.

At the trial before *Eyre Ch. J.* at the *Guildhall* fittings after *Easter Term* 1796, a verdict was found for the Plaintiff on the plea of *non est factum*, and on the 2d, 3d, and 5th pleas; and a verdict for the Defendant on the 4th and 6th pleas, which were as follow. Fourth plea, that "the Plaintiffs and the Defendant long before the making of the said writing obligatory were and still are subjects of this realm; and that before the making of the said writing obligatory *to wit*, on &c. at &c. it was unlawfully agreed by and between the Plaintiffs and the Defendant, that the Plaintiffs should sell and deliver to the Defendant certain goods,

To debt on bond the Defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in London by the Plaintiff to the Defendant, to be by the latter shipped to *Orford*, and from thence re-shipped for the *East Indies*, and there trafficked with clandestinely. Held a sufficient bar to the action; the

case being within the 7 Geo. I. c. 21. which avoids all contracts for supplying cargoes to foreign ships in such a trade.

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wares, and merchandizes of a large value, *to wit*, 363*l.* 1*os.* to be by the Defendant shipped on board certain ships or vessels in the port of *London*, and to be carried and conveyed on board of such ships and vessels to parts beyond the seas, that is to say, to the port of *Ostend*, to be there shipped on board certain other ships or vessels destined to sail to and trade in certain parts in the *East Indies* beyond the *Cape of Good Hope*, without the licence and authority of the United Company of Merchants of *England* trading to the *East Indies*, and to be carried and conveyed in and on board the said last-mentioned ships or vessels from the said port of *Ostend* to a certain place in the *East Indies* beyond the *Cape of Good Hope*, that is to say, to *Calcutta*, to be there sold, trafficked with, and disposed of in a course of trade, clandestinely and without any licence and authority from the said Company; and that in pursuance of such unlawful agreement the Plaintiffs well knowing that the said goods, wares, and merchandizes were to be carried to *Calcutta* aforesaid to be there sold, trafficked with, and disposed of in the course of trade, did afterwards, *to wit*, on &c. sell and deliver to the Defendant the said last-mentioned goods, wares, and merchandizes, in order that the same so to be shipped on board the said ships or vessels in the port of *London* aforesaid might be carried on board such ships or vessels to the port of *Ostend* aforesaid, and there shipped on board the said other ships or vessels, and that the same might be carried and conveyed on board such last-mentioned ships or vessels to *Calcutta* aforesaid, and to be there sold, trafficked with, and disposed of in a course of trade clandestinely and without any licence or authority from the said Company. And that the said goods, &c. were accordingly carried and conveyed on board, &c. from the port of *London* to the port of *Ostend*, and there shipped on board, &c. to be carried and conveyed, &c. to *Calcutta* to be there sold, &c. And that for the securing the payment of the price of the said goods, &c. the Defendant on &c. at &c. did make and seal, and as his act and deed deliver to the Plaintiffs the said writing obligatory in the said declaration mentioned with the condition thereunder written; and which said writing obligatory for the cause aforesaid is wholly void in law." Sixth plea: that "the said writing obligatory was made, sealed, and delivered by the Defendant to the Plaintiffs for securing the payment of the price of certain goods, wares, and merchandizes before then sold and delivered by the Plaintiffs to the Defendant to be by him the

Defendant

Defendant shipped on board certain ships and vessels to be carried and conveyed therein from the port of *London* aforesaid to parts in the *East Indies* beyond the *Cape of Good Hope*, that is to say to *Calcutta*, the Plaintiffs well knowing that the said last-mentioned goods, &c. at the time of the sale and delivery thereof as aforesaid were to be so carried and conveyed to *Calcutta* aforesaid to be there sold, trafficked with, and disposed of in the course of trade clandestinely and without any licence or authority from the United Company of Merchants of *England* trading to the *East Indies*; whereby the said writing obligatory was and is wholly void in law."

The bond was dated on the 1st of *February 1794* and the condition was, that the Defendant should pay to the Plaintiffs 363*l.* 10*s.* on or before the 1st of *August 1795*, with interest at the rate of 5*l. per cent.* from the expiration of six months after the date of the bond. On the bond was the following indorsement: "London, 20th March 1794. A policy of insurance per "the ship *Kaunitz*, from *Oftend* to *Bengal* on account of "Mr. James Tenant rests in my possession, in which the within "mentioned account of 363*l.* 10*s.* is included. *T. Buncok.*" This last person appeared at the trial to have been the Defendant's agent for the purchase of the goods, the Defendant himself residing at *Oftend*. He proved that it was originally stipulated by the Plaintiffs that there should be the above indorsement made on the bond when the policy was effected, which was not to be done till after the arrival of the goods at *Oftend*.

A rule *nisi* having been obtained for entering a judgment for the Plaintiff notwithstanding the verdict found for the Defendant on the 4th and 6th pleas,

Le Blanc and *Marshall* Serjts. shewed cause. 1st, The agreement stated in the Defendant's pleas is illegal, being within 7 Geo., Stat. 1. c. 21., by the 2d section of which act all contracts and agreements whatsoever made by any of His Majesty's subjects for the loan of any money by way of bottomry, "on any ship or ships in the service of foreigners, and bound or designed to trade to the *East Indies*, and all contracts and agreements whatsoever made by any of His Majesty's subjects; or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, &c." are declared to be void. The agreement there described is precisely that stated

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in the plea. 2dly, Supposing this agreement not to be made void by the 7 Geo. 1., still the trade itself being illegal, the Plaintiffs cannot recover. The case of *Holman v. Johnson*, Cwp. 341. will probably be cited on the other side. There the goods were sold in the ordinary course of trade, and though the Plaintiffs knew they were to be smuggled into this country, they did not sell them for that purpose; the illegal use made no part of the contract. But the case of *Biggs v. Lawrence*, 3 Term Rep. 454. is an express authority against the Plaintiffs' recovery. The ground of that determination was, that the goods were sold for the purpose of being smuggled into *England*. The distinction between these two cases establishes the Defendant's plea, for the goods here were sold for the purpose of being smuggled into *India*, and the agreement was that they should be sent to *Ostend*, and from thence to *Calcutta*. *Clugas v. Penaluna*, 4 T. R. 466. and *Waymell v. Reed and another*, 5 T. R. 599. are also authorities to shew that a Plaintiff who takes any part in an illegal transaction cannot recover.

Adair and Shepherd, Serjts. contra. 1st, The contract on the part of the Plaintiffs being only to deliver these goods at *Ostend*, this bond is not made void by 7 Geo. 1., which does not apply. Here the vendors had full power over the goods, and might have re-sold them at *Ostend*, since the Plaintiffs' interest in them cease on their arrival at that place. 2dly, The cases decided on this subject do not preclude us from recovering. The principle of *Holman v. Johnson* is, that where the contract of sale is complete before the illegal part of the transaction commences, the bare knowledge in the vendor of the vendee's intent does not vitiate the contract. In each of the three other cases cited, the Plaintiffs had taken some step to effectuate the illegal intention. It has never yet been determined that *bare knowledge* of an illegal intent in the vendee, bars the vendor's recovery.

Cur. adv. null.

The judgment of the Court was this day delivered by

EYRE Ch. J. We are all of opinion, that the 4th plea is good and a sufficient bar to the Plaintiffs taking anything by this application. The ground of the defence to be collected from this plea is thus opened by Lord Mansfield in *Holman v. Johnson*, Cwp. 343. "The objection that a contract is immoral or illegal sounds "at all times very ill in the mouth of a Defendant. It is not for

" his sake however that the objection is ever allowed; but it is founded in general principles of policy, which the Defendant has the advantage of contrary to the real justice as between him and the Plaintiff, by accident, if I may so say. The principle of public policy is this *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an *immoral* or an *illegal* act. If from the Plaintiff's own stating, or otherwise, the cause of action appears "to rise *ex turpi causa*, or the *transgression of a positive law of this country*, there the Court says, he has no right to be assisted." After this introduction His Lordship stated the question in that cause to be "whether the Plaintiff's demand "is founded upon the ground of any immoral act or contract; "or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country?" And this is the question which arises between the parties to this record upon the 4th plea. The substance of this plea is, that it was agreed between the Plaintiffs and the Defendant that the former should sell and deliver goods to the latter, to be by him shipped in the port of *London*, to be carried to *Ostend*, to be there shipped on board ships destined to trade in the *East Indies* without licence from our East India Company, to be carried to *Calcutta*, to be there sold clandestinely; that in pursuance of this agreement, the Plaintiffs sold and delivered goods to the Defendant, knowing &c. and in order &c. and that in fact the goods were carried to *Ostend*, and shipped for *Calcutta* to be there sold; and that this bond was given for securing the payment of the price of those goods, and so void in law. It was agreed in the argument, that it is prohibited by the positive law of this country to furnish goods to be shipped on board foreign ships trading to the *East Indies*. By the 7 Geo. 1. c. 21. s. 2. all contracts and agreements for the loading and supplying such ships with a cargo are declared to be void. For the Plaintiffs it was contended, that the above admission must be taken with this reserve, that the prohibition attaches only on the person who has the immediate interest in the supply. I admit that the person who has the benefit of the supply is the immediate object of the act, the title of which is "for the further preventing His Majesty's subjects from trading to the *East Indies* under foreign commissions." Very probably those who are more remotely concerned in furnishing the supply, may not be directly within the scope of the act. But it will not follow, that their contracts will be valid. Upon the principles of the common law,

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the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay the agreement to sell and deliver goods is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling, will be thereby impelled to use his knowledge to make the contract more beneficial to himself, and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very *gift* of the contract. It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprize but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to *Calcutta* to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade. Such a man would not advance five pounds worth of goods which were not to be employed in the contraband trade. It is essential to his views and it enters into the spirit of his contract that the goods shall be employed according to their destination. Doubtless the buyer of goods, having them in his possession, may divert them from the intended channel; but then he is not the honest man whom the seller of the goods took him for, and in truth he breaks his contract. This is a supposed case. But this supposed case is not immaterial to the argument; because the strength of the Plaintiff's case, as it has been argued for them, is, that supposing the transaction to have been as it is stated to have been in this 4th plea, their share in it *necessarily* ended with the delivery

very of the goods, and by *no possibility* could they have any thing to do with their future destination. By possibility most certainly the Plaintiffs might be very deeply interested in the future destination, though the conduct of the speculation was unavoidably entrusted to the buyer. And a possible case of interest in the future destination is an answer to the argument that of necessity they could have nothing to do with it. But the plea having been found by the jury the Counsel for the Plaintiffs were driven to that argument. The proper time to insist that the Plaintiffs had nothing to do with the future destination of the cargo was when the plea was before the jury; and if the truth of the case would have warranted it, the fact might have been negatived by evidence, demonstrating that the Plaintiffs' part in the transaction did really end with the delivery, and that the future destination had nothing to do with their contract. They might have disproved all knowledge; indeed it was necessary that they should disprove it. Knowledge affords a strong ground to infer participation in the whole transaction. Communications of such a nature are not made unnecessarily. From the price fixed, the situation of the buyer, his ability to pay, a fair account of the extraordinary credit given to him, and other particulars, inferences of fact might have been made by the jury favourable to the ground now taken for the Plaintiffs, that in fact they were not involved in any part of the transaction subsequent to the delivery; and upon this ground the jury might have been warranted in finding against the plea. But the jury having found for the plea, the Court cannot say that the Plaintiffs had nothing to do with the future destination of the goods, unless it was impossible to state a case in which he could have any thing to do with it. I think it was not disputed that if the Plaintiffs' contract extended to the future destination of the goods such a contract would be void. It seems therefore hardly necessary to enter into an examination of the four cases which were cited from *Cowper* and the *Term Reports*. The result of the cases is, that knowledge, in the seller of the goods delivered, of the future destination of those goods, with the further circumstance of packing the goods in a form convenient for smuggling, will avoid the contract if sued upon here, and *a fortiori* if the seller be resident in this country. The case now in judgment is certainly not *in terminis* this case. And I use the cases only as authorities for the principle. Upon this plea, the Plaintiffs do not merely *affit another*, they must be taken to be principals in the illicit

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had the testator given "all his inheritance," a fee would have passed in the * same manner as if he had said "all his estate" (a). [Eyre Ch. J. observed that the words "all his estate" may, but do not necessarily pass a fee, and Heath J. that where they are words of description they do not.] In *Holdfast v. Marten*, 1 T. R. 411. the word "estate" was held to carry a fee though it denoted locality, being "my estate at B." and in *Fletcher v. Smiton*, 2 T. R. 656. the word "estates" in the plural number, had a like import given to it though the case was still stronger as the testator had before by the same description given an estate for life. The meaning of the word "hereditaments" in a will, may be collected from *Lydcott v. Willows*, 3 Mod. 229. where Powell J. contrary to the opinion of the rest of the court, held that it imported an inheritance and would carry a reversion; and his opinion was afterwards confirmed in the *Exchequer Chamber*, where the judgment below was unanimously reversed, 2 Vent. 285. S. C.; and though Gould J. in *Smith v. Tindal*, 11 Mod. 103, 4., where the word "hereditaments" was used in a devise and a perpetual charge created upon the estate, decided entirely on the charge in favour of a fee, yet Holt Ch. J. expressly founded his opinion on the word "hereditaments," as carrying a fee. So in *Frogmorton & Wright v. Wright and another*, 3 Wilf. 418. De Grey Ch. J. held that the word "hereditaments" in a will may be a fee. Of *Canning v. Canning*, Mo. 240. which has been cited to shew that a fee will not pass under this word, it may be observed that the *Master of the Rolls* there went on the case of *Hopewell v. Ackland*, Salk. 239. (which does not apply here, as the decision proceeded on other words there used in the devise) and on the intention of the testator. Besides Lord Mansfield, 5 Bur. 2629. treats *Moseley* as a book of no authority. It was indeed truly observed by Buller J. in *Doe d. Palmer v. Richards*, 3 Term Rep. 360. that different opinions had been entertained on the operation of the word "hereditaments (b)." The strongest authorities are however in our favour. If indeed the word be limited it may carry an estate for life; but where used generally it will pass a fee. If however the word "hereditaments" will not pass a fee, still the generality of the sweeping clause in this devise will do it. The testator had but two objects of his bounty, N. Lister and his wife; the latter was the principal object,

(a) *Vid. Willis*, 296. and the cases on this subject there collected by the learned Editor in the note. *Vid. etiam Hogan v. Gough*, Crisp. 206. and what is said by the

Court on the operation of the word "estate," in *Whitelock v. Haddon*, ante, 247, 8. (b) *Vide* what is said by Buller J. ante 248.

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as he made her executrix and residuary legatee. If then his intention is clear and there is no rule of law to control it, that intention must prevail. What that is, appears clearly from the clause directing the payment of debts and legacies; for where the executorship might possibly become a burden without a fee, the Court will imply that a fee was intended to be given. *3 Bur. 1535. arg.* It cannot be said that nothing but the personalty was charged, for if that were not sufficient any Court would hold the land liable. The devise of the realty does not end at the word "wheresoever," for no words of disposition occur until after the description of the personalty. The sentences are coupled by the word "and;" and the word "same" in the disposing part refers to the real as well as personal estate. [*Heath J. Cliffe and others v. Gibbons, 2 Ld. Raym. 1324.* is in point; the testator there having devised to his wife the residue of his estate after debts and legacies paid, Lord Chancellor *Cowper* was clearly of opinion that a fee passed.] The cases cited to shew that the executrix does not take a fee in respect of the charge are not applicable; in *Egles v. Cary, 1 Vern. 457.* no question was raised about the fee, and in *Dickins v. Marshall, Cro. Eliz. 330.* the effect of charging debts, &c. on the land was not considered. Besides the reporter of the latter case was at that time young, and it may be further impeached by the improbability of the 2d resolution, viz. that the parties took as joint-tenants. The case of *Doe d. Palmer v. Richards* is decisive, for the words "thereout paid" as applied to payment of debts, &c. used in that case, are equivalent to the words here "after payment," &c.

Arguments for the Defendant in Error. The Court will not disinherit the heir at law without express words to that effect. Now whatever the testator's intention might have been, there are no words which can be held to give more than an estate for life to *Siffly Carr*. Indeed the devises to *N. Lister* and to her are nearly alike, and the former is admitted on all hands to pass only an estate for life. The words "whatsoever and wheresoever" in the latter devise apply only to quality and place, not to duration of interest; and as to the word "hereditaments" not being used in the devise to *N. Lister*, the subject of that devise was but a mezzanine. In all the cases cited to shew that the word "hereditaments" carries a fee, there was a perpetual charge on the estate, and that weighed with the judges. The case of *Hopewell v. Ackland* is precisely similar to this; there the fee was expressly held not to pass under the clause in which the word "hereditaments" was used, but under that

that which gave all that the testator had not before disposed of. The terms "rest and residuum" occurred in *Canning v. Canning*, yet there only a life estate was given; and though the principal point in that case is not perhaps applicable to this, and the reporter not good, still the *Master of the Rolls* cannot well have been mistated who treated it as a settled point that the word "hereditaments" would not pass a fee. The definition of *haereditas* by the civilians is, "what a man inherits;" *haereditamentum* is used to express "what a man transmits." *Hopewell v. Ackland* is expressly in our favour. All the cases which have been cited to explain the word hereditaments as carrying a fee, were attended with other circumstances which influenced the judgments. In *Lydcott v. Willows*, as reported in 3 *Mod.* 229. there was some comment on the word "hereditaments," but no decision; and in 2 *Vent.* 285. that word was not discussed. Besides, the decision was to enable the wife to pay legacies, and went upon the charge. So in *Smith v. Tindal* there were words of charge, and the case was not determined on the meaning of the word "hereditaments." So *De Grey Ch. J.* in 3 *Wils.* 418. and *Buller J.* 3 *Term Rep.* 360. only say that "hereditaments" may pass a fee when coupled with, other words. Are there then other words in this devise sufficient to give that effect to "hereditaments?" The devise of the realty ends at the word "wheresoever;" nor is it common to charge funeral expences on the real estate. The charge therefore only relates to the personal estate, which is the proper fund, as appears from *Eyles v. Cary*. And even supposing the realty to be charged, a fee will not necessarily pass, because the estate may be given subject to the charge into whatever hands it may come. In *Merson v. Blackmore*, 2 *Atk.* 341. the debts being charged on the realty on the contingency of the personality only not sufficing, it was held that such a charge would not raise the estate into a fee. In *Doe d. Palmer v. Richards*, the devisee was to pay *out* of the particular estate devised. Here if the devisee had died in the life of the deviser, the lands would have gone to the heir, subject to the charge. The only difference between this case and *Dickens v. Marshall*, is that here the devise is after payment of debts and funeral expences, and there it was after payment of debts and legacies; and yet it was there held that an estate for life only passed. With respect to the words "all the rest of my lands," &c, though *Wheeler v. Walroone, Alleyn*, 28. is an authority to shew that such words pass a fee not expressly devised, yet the authority of the report in *Allyn* is much shaken by the observation in

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3 P. Wms. 63. note [E], that on inspection of the record it appeared to have been found by the special verdict, that unless the reversion in fee passed by the will there would not be sufficient to pay the testator's debts.

EYRE Ch. J. I should feel much difficulty in deciding this case upon the technical meaning of the word "hereditaments." I am disposed, however, to agree that the word "hereditaments" imports only to be a description of that in which the devisor has an inheritance, not of his interest in it. No doubt a life estate may be given to the devisee out of an estate in which the devisor has himself a fee. But the question will be, Whether the rest and residue of my lands, &c. may not include all the interest, when used in a residuary clause? Undoubtedly a life estate might have been expressly given in the rest and residue, &c. and then the words "rest and residue" would have been merely descriptive of the lands. The question before us is a question of intent, and does not arise upon the technical sense of the words. It does not indeed appear to me that an intent to give a fee can be implied from the words "after payment of my debts and funeral expences," for no such absolute charge is created as will render it necessary that a fee should pass. But it is fairly to be collected that the testator intended to give his wife all that was not before devised. For this purpose he employed the most comprehensive words: "hereditaments" imports all that in which he had an estate of inheritance; and the words "rest and residue" are sufficient to pass the whole interest, if the intent be clear. This appears from the cases where an intent has been raised from introductory words (*a*). Here one copyhold is given to *N. Lister*, and then comes this sweeping clause: "All the rest of my lands, tenements, and hereditaments whatsoever and wheresoever, and also all my goods, chattels, and personal estate of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath the same unto my wife *S. Carr*." The whole personal estate, together with all the *rest* of the real estate, after payment of debts and funeral expences, is given to the devisor in this one clause. What is this but saying, "I will first have my debts and funeral expences paid, and then I give what is left to the

(a) On the general effect of introductory words in a will, see *Ibbetson v. Backwith*, *Cas. temp. Talbot*, 160. *Maudy v. Maudy*, *Cas. temp. Hardw.* 142. 2 *Sr. 1020*. S. C. *Frogmoreton d. Wright v. Wright*, 2 *Bl. 889*. 3 *Wif.* 414. S. C. *Lovacres d. Mudge v. Blight et ux.* *Cowp.* 352. *Denn d. Gafkin v. Gafkin*, *Cowp.* 657. *Goodright d. Baker v.*

Stacker, 5 *Term Rep.* 13. and *Doe d. Child et ux. v. Wright*, 8 *Term Rep.* 64. For their effect as operating on the residuary clause of a will, see *Grayson v. Atkinson*, 1 *Wif.* 333. *Hogan v. Jackson*, *Cowp.* 299. *Doe d. Burkitt v. Chapman*, 1 *H. Bl.* 123. and *Fogerton en dim. Brankstone v. Bodley*, 3 *Burr.* 1618.

devisee?

devisee? If the intent be clear, there are apt words sufficient for the purpose. Therefore, without defining the meaning of the word "hereditaments," we think that the plain intent of the testator makes it necessary to give this import to the devise.

Per Curiam,

Judgment reversed.

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Moor; in Error.

(In the *Exchequer Chamber.*)

HAILLE v. SMITH and Another, in Error.

THIS was an action of trover brought in the *King's Bench* by the Defendants in Error, to recover from the Plaintiff in Error, as Captain of the ship *Hawke*, a cargo of iron and hemp. The cause was tried before *Lawrence J.* at the summer assizes for *Lancaster* 1794, and a verdict found for the Defendants in Error for 4710*l.* 18*s.* Upon this a bill of exceptions was tendered by the Counsel for the Plaintiff in Error, and sealed by the learned Judge. From that bill of exceptions, when annexed to the record in this court, the case appeared to be as follows:

The Defendants in Error were merchants and bankers residing in *London* and carrying on business under two different firms, namely, the banking business under the firm of *Samuel Smith, Sons, and Co.* and the business of merchants under the firm of *Smiths and Atkinson*. *George and Henry Brown*, merchants at *Liverpool*, some time since opened an account with *Samuel Smith, Sons, and Co.* as bankers, in the regular course of business, remitting bills, and drawing against them as occasion required. In January 1793, *G. and H. Brown* wishing to increase their drafts to a much greater amount than had been at first desired or intended by *Samuel Smith, Sons, and Co.* entered into an agreement with them to the following effect: that *G. and H. Brown* should be at liberty to draw 5000*l.* per week from the 1st of February to the 12th of March upon *Samuel Smith, Sons, and Co.* remitting them good bills of exchange on *London* to cover the amount; and that as a further security they should lodge a credit with two houses at *Hamburg* against goods consigned to those houses to the amount of 20,000*l.* of which *Samuel Smith, Sons, and Co.* might avail themselves as they should think proper; and also as a collateral security consign to the house of *Smiths and Atkinson* hemp and iron to the amount of 10,000*l.* on sale for their account. This agreement was entered

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9 East, 509.

14 East, 592.

A. of *Liverpool* wishing to draw upon the banking-house of *B.* in *London* to a large amount, agreed, among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking-house, though under the firm of *B. & C.*; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to *B. & C.* but the cargo was prevented from leaving *Liverpool* by an embargo; A. then became bankrupt, being considerably indebted to *B.* and the cargo was delivered to his assignees by the Captain; held that *B. & C.* might maintain trover for it against the Captain.

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into for the accommodation of *G. and H. Brown*, and entirely at their request. In consequence of this *G. and H. Brown* did draw upon *Samuel Smith, Sons, and Co.* to a considerable amount; and in pursuance of the agreement on the 13th of February 1793 remitted to *Smiths* and *Atkinson* the invoice and bill of lading indorsed in blank of the ship *Hawke* of which the Plaintiff in Error was captain, and for the cargo of which this action was brought. In the correspondence which took place between *Smiths* and *Atkinson* and *G. and H. Brown*, subsequent to this remittance, the former applied to the latter for directions respecting the disposal of the goods and the prices they might be willing to take. An insurance was effected on the cargo in the name of *Smiths* and *Atkinson*, who were to receive the usual commission on the sale. At the time when the invoice and bill of lading were remitted the *Hawke* was in the port of *Liverpool* and ready to sail for *London*, but was prevented from sailing by an embargo. *Samuel Smith, Sons, and Co.* having in consequence of the credit lodged in their favour with the houses at *Hamburg* drawn upon those houses, and having had several of their bills returned from thence protested for non-payment, immediately applied to their own use a parcel of bills remitted to them by *G. and H. Brown* on the 2d of March 1793, and refused to accept the bills drawn by *G. and H. Brown* upon them at the same time. At this period, and on the 5th of April 1793, when *G. and H. Brown* were declared bankrupts, the balance of accounts was considerably in favour of *Samuel Smith, Sons, and Co.* In consequence of the bankruptcy *Smiths* and *Atkinson* having demanded of the captain the cargo of the ship *Hawke* which was still lying in the port of *Liverpool*, and tendered the charges, the latter refused to deliver it to them, alleging orders to that effect from the assignees of *G. and H. Brown*, to whom he afterwards delivered it. The Defendants in Error called two eminent merchants to prove that bills of lading, when made out to the order of the shipper or his assigns, are negotiable or transferable by the shipper's indorsement, which vests the property in the indorsee; and that when such bills of lading are transmitted from abroad, it is usual for merchants to accept bills in consequence of them, before the arrival of the goods. Upon this evidence the learned Judge directed the jury that the consignment of the cargo of the ship *Hawke* to *Smiths* and *Atkinson* was not a consignment to them as the factors or agents only of *G. and H. Brown* acting merely for the benefit of their principals, but was a consignment to *Smiths* and *Atkinson*.

Atkinson not only to sell the same under the direction of *G. and H. Brown*, but also by the produce thereof to protect and indemnify the banking-house of *Samuel Smith, Sons, and Co.* against their advancements and acceptances on account of *G. and H. Brown*, and that the law, as between principal and factor, did not arise in this case: that if, therefore, they believed the evidence shewn of the custom of merchants with respect to the transfer of a bill of lading, then the Plaintiffs (now Defendants in Error,) were entitled to the cargo, and the captain's refusal to deliver was evidence of a wrongful conversion. To this direction the bill of exceptions was tendered.

This case was twice argued; in *Easter Term 1796*, by *Chambre* for the Plaintiff in Error, and *Lowndes* for the Defendant; and again on this day by *Law* for the former and *Wood* for the latter.

Arguments for the Plaintiff in Error. The first observation that presents itself in this case arises on the negotiability of a bill of lading by indorsement; with respect to which point we must refer the Court to the several reports of *Lickbarrow v. Mason* (*a*), where the subject was completely exhausted. We contend, indeed, that the direction of the learned Judge upon that point was incorrect; for the question, Whether such an instrument be negotiable or not? is part of the law of merchants, and as such ought not to have been submitted to the jury. *Grant v. Vaughan*, 3 *Burr.* 1523. and *Pillans & another v. Van Mierop & another*, 3 *Burr.* 1669. The next consideration will be, whether, under the circumstances of this case, there was such a negotiation or assignment as amounted to a complete transfer of the property, or whether the consignor and consignee did not stand in that relation to each other, in which the law, as between principal and factor, applies. Admitting that by virtue of the indorsement of a bill of lading property *prima facie* passes, still that indorsement is capable of being so explained by evidence as to shew the indorser's intent to pass some minor interest, or qualified authority, in respect of the goods. In support of this the opinion of Lord *Mansfield* in *Wright v. Campbell*, 4 *Burr.* 2050. may be referred to. The effect of an indorsement on a bill of lading cannot be more general than that of an indorsement of a bill of exchange: now the latter may be indorsed for various purposes; as to apply

(*a*) Judgment for the Plaintiff in *K. B.* Lords, 2 *H. Bl.* 211. and 5 *Term Rep.* 367.
2 *Term Rep.* 63. That judgment reverted Special verdict on the second trial and judgment for the Plaintiff in *K. B.* 5 *Term Rep.*
in the Exchequer Chamber, 1 *H. Bl.* 357. *Venire de novo* awarded in the House of 683.

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of the freight, and become insolvent before the bills are due, and before the goods get into his *actual* possession the consignor may stop them *in transitu*. The principal case is even stronger than that, for there the ship had arrived at the port of delivery, whereas here it had never migrated from the port of loading. In *Lickbarrow v. Mason*, 2 *Term Rep.* 72. Mr. J. *Ashurst* observes, that where delivery is to be at a distant place, the contract, as between the vendor and vendee, is ambulatory till delivery, though not as between the vendor and third persons if a bill of lading has been remitted. If therefore this case be considered as between vendor and vendee, no third persons having intervened, the contract must here be considered ambulatory till actual delivery. It is the course of trade to make out two or three bills of lading; according to the terms of the bill of lading the captain is to deliver to the shipper or his assigns; and when there are different claimants upon different bills of lading, it is not his business to examine who has the best right. *Fearon v. Bowers*, cited *per Lord Loughborough* in *Lickbarrow v. Mason*, 1 *H. Bl.* 365. The captain, therefore, in the present case, satisfied his contract by a delivery to the assignees of the shipper. In addition to this, it may be contended that the property never vested in *Smiths* and *Atkinson*, because the banking-house never executed their part of that agreement under which the consignment was made. The bills of *G. and H. Brown* having been dishonoured, they were entitled to stop the consignment in the port of *Liverpool*.

Arguments for the Defendants in Error. When a custom has once been found to be a custom of merchants, it becomes by that finding the law of the land. This doctrine was acted upon by *Lord Kenyon* in the case of *Hunter v. Buring* (tried at the same fittings in which the second trial of *Lickbarrow v. Mason* had taken place), who refused to hear any evidence respecting the negotiability of a bill of lading, it having been already admitted upon record in the special verdict in *Lickbarrow v. Mason*. That special verdict, therefore, as reported 5 *Term Rep.* 683. is an authority to shew that bills of lading are negotiable. If *Smiths* and *Atkinson* had stood in the mere relation of factors to *G. and H. Brown* as their principals, undoubtedly they could have had no lien upon the goods for the balance of their account until they had come into their actual possession. But though that be law as between principal and factor, yet where one transfers goods to another in trust to indemnify a third person against money which he may advance that law does not apply, because the

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property immediately vests in the trustee in whom it is intended to vest. Here the agreement was that *G. and H. Brown* should consign hemp and iron to *Smiths* and *Atkinson*, the meaning of which agreement was, that the former should transfer to the latter, by the usual mercantile mode of transfer, goods in trust to be sold, and the produce to be retained as a collateral security for what the banking-house should advance. The mode of transfer adopted, namely, the indorsement of a bill of lading in blank, was an adequate mode of transfer. For a mere agreement for one to sell and the other to buy a specific thing will pass the property in chattels without actual delivery if the consideration be paid. It is true that the vendor has a right to stop *in transitu* where the consideration has not been paid and is not likely to be paid; but that law cannot affect this case where there was no pretence to stop *in transitu*, as the banking-house had actually paid by advances the value of the goods. Upon this head there are many cases. In *Keiltz*. 77. pl. 25. it is said that if a man buy twenty quarters of malt which is put into sacks or otherwise severed from the other malt, the property is altered. So in *Evans v. Martell*, 12 Mod. 156. the Court say that the consignment in a bill of lading gives the property; and in *Grips v. Ingledew, Farresley* 89. it was held that under an agreement to pay so much for every hundred flocks of wood lying in such a wood, and so for more as it should be felled, the property of every hundred cut at the time of the agreement vested in the purchaser, and so of the rest as they were cut down. There is also a case cited in *Evans v. Thomas*, Cro. Jac. 172. "one covenants with another, that if he will marry his daughter he shall have such a flock of sheep; he marries his daughter; the property of the sheep was presently in him, because it was but a personal thing and the covenant is a grant (a)." Again, in an action on the case upon mutual agreements a note was given in evidence in the nature of a bill of parcels, expressing that *A.* had bought of *B.* one hundred pieces of mullins at forty shillings per piece, to be fetched away by ten pieces at a time, and paid for as taken away; there *Holt C. J.* at *Guildhall* held that the pieces being marked and sealed, the property was altered immediately, and that they remained only as a security for the money. *Knight v. Hopper, Skinn.* 647. Indeed in *Lickbarrow v. Mason, Lord Loughborough* says, "A destination of the goods by the vendor to the use of the vendee, the marking them, or

(a) See *Fitz. Abr. Monstrans de faits*, pl. 144.

" making

"making them up to be delivered, or removing them for the purpose of being delivered, may all entitle the vendee to act as owner to assign and to maintain an action against a third person into whose hands they have come." 1 *H. Bl.* 363, 364.

Upon these authorities it may be contended, that the instant the destination of these goods was ascertained, and they were put on board in order to be delivered to *Smiths* and *Atkinson*, the property was immediately transferred to them, because a valuable consideration had already moved from them. This specific property being once ascertained, they were thereby enabled to maintain trover for the goods, unless *G. and H. Brown* or their assignees could have shewn a just cause for retracting the delivery. It may also be argued, that the cargo having been delivered by *G. and H. Brown* to the Defendant for the use of the Plaintiffs upon a good preceding consideration, the Defendant may be looked upon as a trustee for the benefit of the Plaintiffs. In *Brand v. Lifley*, *Yelv.* 164. *A.* being indebted to the Plaintiff in 100*l.* for the satisfaction of the debt, delivered to the Defendant sundry goods amounting to the value of the debt; and it was adjudged, that by the delivery of the goods to the defendant to satisfy the Plaintiff, the Plaintiff acquired a property and interest in the goods. To the same effect are 1 *Bulstr.* 68. 2 *Leon*, 89. *Dyer* 49. *a.* Nor can any distinction be made on the ground of the property having been transferred to *Smiths* and *Atkinson* as confignees, instead of the very house whose advances the conignment was designed to cover. The former were to sell the goods for the special purpose of indemnifying the latter by the proceeds, and till that sale *G. and H. Brown* were to stand the risk, and to provide the fund from which the contingent charges were to be defrayed. This accounts for the insurable interest in both parties. The confignors had an interest in that property, which when sold was to pay their debt, and the confignees were interested in the same property, because it was the security on which their advances were made. In the case of *Kinloch v. Craig*, principally relied on by the Plaintiff in Error, the bill of lading was not indorsed; indeed that was merely a case of principal and factor, whereas here there was an actual transfer of the property in trust to indemnify the banking-house, and that property was paid for before the transfer took place.

EYRE Ch. J. The case is now brought to a point in this one short proposition, viz. That the property was transferred to *Smiths* and *Atkinson* upon a trust in which those who transferred the property, and the banking-house were concerned. If this can be main-

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banking-house had become debtors to the confignors, and had become insolvent, the effects of the confignors would have gone to pay their debts. The injustice of this seemed so flagrant, that I felt great difficulty in acceding to a proposition attended with such consequences. But I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution. This will lead to the conclusion, that the moment the goods were put on board the *Hawke*, and the bill of lading was indorsed and remitted to *Smiths* and *Atkinson*, the property was changed, and was to remain in their hands cloathed with the trust expressed in the agreement. In this view of the case, the circumstance of the risk remaining in the confignors will only relate to the manner in which the trust was to be carried into execution. The profit or loss at which the goods might be sold would affect the advantage which the confignors were to derive from the trust; but still the risk of the confignors in that respect affords no objection to the existence of the trust itself: I therefore feel the ground of argument, as it now stands before us, much changed from what it appeared to be; and shall have no difficulty in holding that this cargo was vested in *Smiths* and *Atkinson*, notwithstanding the risk remained in those who transferred the cargo, and notwithstanding that cargo was to be sold with a view to the profit or loss of the confignors. Those circumstances will not prevent a transfer of the property under the agreement, which was for a valuable consideration; though I can by no means assent to the proposition, that the agreement, though for a valuable consideration, will amount to any thing like a bargain and sale.

Per Curiam,

Judgment affirmed.

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WAGHORNE v. LANGMEAD.

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JUDGMENT in this case was signed on the 23d of May; on the 29th of the same month the Defendant died, and on the 31st a *f. fa.* teste'd previous to the Defendant's death was lodged in the office of the sheriff of *Middlesex*: under this the sheriff levied.

Clayton Serjt. on a former day obtained a rule to shew cause why the *f. fa.* should not be set aside for irregularity, and why the money produced by a sale of the goods which remained in the hands

If a *f. fa.* be teste'd before Defendant's death, but delivered to the sheriff and executed after, the execution is regular.

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of the sheriff should not be restored to the administrator of the Defendant. He contended, that the *scire facias*, being lodged in the office subsequent to the death of the Defendant, the execution thereon was irregular, and cited *Heapy v. Parris*, 6 *Term Rep.* 368, where the *testfe* was after the death of the party; and *Walker v. Drawwaters*, E. 36. Geo. 3. in *Scacc.* (a), where the same doctrine was held, though the *testfe* was before the death of the party. He insisted also that the judgment here should have been revived by *scire facias*, since the administrator, who was a stranger in this case, was to be affected by it. In support of this he relied on *Penoir v. Brace*, 1 *Salk.* 319. (b) where it is said by the Court, that "where any new person is either to be better or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him party to the judgment, as in case of executor and administrator;" and on Lord Kenyon's opinion in *Heapy v. Parris*. He added, that the Defendant here died insolvent, leaving bond and other creditors, for whom the administrator was to be considered as trustee; and therefore, by the statute of frauds, the writ could only bind from the delivery to the sheriff. (c)

Shepherd Serjt. contrà, cited *Houghton v. Rushby*, *Skin.* 257. *Comb.* 33. S. C. *Springer v. Somerville*, *Bunb.* 271. and Dr. *Neatham's* case, *ibid.* in the note.

BULLER J. read a case of *Dakin v. Cartwright*, *Hil.* 12 *Geo.* 2. K. B. (d) from a manuscript note, and said that *Walker v. Drawwaters* was decided on a misconception of what had been done in the King's Bench. He referred also to 3 *P. Wms.* 400, and 2 *Eq. Cas. Abr.* 381.

The Court were of opinion, that the current of authorities was against the application on the 1st ground, and that to make a *scire facias* necessary to support this execution, the process must appear to have issued after the death of the party: that with respect to the creditors, though the property in the goods of the deceased was not bound till the delivery of the writ to the sheriff, yet the right

(a) See 3 *Anstrutb. Rep.* 680.

(b) But it was also held in that case that the death of a party is not material, if subsequent to the *testfe*.

(c) 29 *Car. 2.* c. 3. s. 16.

(d) The case of *Dakin v. Cartwright* was not precisely in point: but according to Mr. Justice Buller's note, *Lec. C. J.* there said; "There was a case, *Mich. 13 W. 3. B. R. Gill v. Parsons.* Judgment was entered between *Hilary* and

Easter Terms, after which Defendant did Execution was taken out *testfe'd* the 1st day of *Hilary Term*, and the goods in the hands of the executor were taken. Upon motion it was holden, that though a judgment in respect of purchasers binds only from the signing, yet as to the party and his representatives it binds as it did before at common law, and that the execution so *testfe'd* was therefore regular."

of the creditors to pursue that property till the delivery of the writ would not make this execution irregular.

Rule discharged. (a)

(a) *Vide etiam Parker v. Mose, Cris. 181.* which was before the statute of frauds, and the following cases which were after: *Anonymous, 2 Vent. 218. Pennair v. Brace, 3d Ref. 1 Ld. Ray. 244. 1 Salk. 319. S. C. Robinson and others, v. Tongue and others, 2d Ref. 3 P. Wms. 399. Lord Winchelsea's case, note. Ibid. Fawkes v. Atkinson, Burnes, 268. ed. 3. and Tidd's Pr. K. B. 728. ed. 1. 932. ed. 2. In Robin-*

son v. Tongue it was said that the statute of frauds concerns purchasers only, and not creditors; and in *Houghton v. Roffby*, and *Springer v. Somerville*, that an execution of this kind is regular under the statute of frauds, which extends only to creditors and purchasers, but not to executors and administrators who stand in the place of the party.

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FENN ex dem. BLANCHARD v. S. WOOD, Executor of Nov. 21st.
W. WOOD.

EJECTMENT tried at the summer assizes for Kent before Lord Kenyon: Verdict for the Plaintiff.

Early in this Term a rule *nisi* for a new trial was obtained on an objection arising out of the following circumstances: On the 13th February 1795, *W. Wood* the Defendant's testator purchased of one *Farar* the remainder of a term of sixty-one years in certain premises at *Sydenham*. A small part of those premises, with a wooden house standing thereon, had been previously underlet for a term of fifty years to one *Blanchard* at the yearly rent of 17*l.* who had again underlet a part exclusive of the wooden-house for a term of forty-eight years and three-quarters to one *Oozman* at a ground-rent of 2*l. 2s.* *Blanchard* had covenanted with *Farar* to build a substantial house on some part of the premises demised to him; *Oozman*, when he took his lease from *Blanchard*, covenanted to perform this agreement for him. When *W. Wood* purchased of *Farar*, it was supposed that *Blanchard* had surrendered his interest, he having failed in the payment of his rent and delivered up the keys of the wooden house to *Farar's* servants; but the lease still remained in his possession. *W. Wood* purchased of *Oozman* his interest in the house which he had built in pursuance of his agreement with *Blanchard*, but suffered him to continue in possession as his tenant. He also pulled down the wooden house. Upon this *Blanchard*, with a view to recover his premises, served *Oozman* alone with a declaration in ejectment; and the present Defendant, as executor to *W. Wood*, (who was deceased,) was admitted as landlord to defend. No ground-rent was in arrear from *Oozman* to *Blanchard*. The lessor of the Plaintiff

If a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover such premises as the tenant is proved to be in possession of.

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Plaintiff only proved a title to the wooden house, and had a verdict for that. The objection to this verdict was, that *Oozman* alone having been served with the ejectment, the rule under which the Defendant, as landlord, was admitted to defend, extended only to the premises of which *Oozman* was proved to be tenant in possession, and not to any of which the Defendant himself was in possession.

Le Blanc Serjt. shewed cause. It is objected to this verdict that the premises recovered were in *Oozman's* possession. If a declaration be served on several tenants, and one landlord comes in to defend for one tenant, he must specify the premises for which he defends; but in *Doe ex dem. Jeffer v. Bacchus*, Mich. 30 Geo. 2. at fittings Bull. N. P. 110. this distinction was taken, "that if there be but one Defendant as tenant in possession, the Plaintiff need not prove him in possession; because if he was not, why did he enter into the rule (a)." The whole, therefore, of these premises having been specified in the margin of the common consent rule, and not restrained by any description in the rule by which the landlord was admitted to defend, he cannot complain of want of notice.

Shepherd Serjt. *contrá*. The common consent rule must be construed by the subsequent rule under which the landlord is admitted to defend. If that be not the case, the Plaintiff in ejectment may recover from the landlord lands at two different ends of the county holden by different tenants. Though by the common consent rule the Defendant is bound to "confess lease, entry, and ouster of so much of the tenements specified in the Plaintiff's declaration as are in possession of the Defendant or his tenant, or any person claiming by or under his title," yet those general expressions must, where the landlord defends for his tenant, be restrained to the premises in his tenant's possession, and for which he has been served. Besides, the declaration in ejectment is narrowed by the notice of the casual ejector. In *Smith ex dem. Taylor v. Mann*, 1 Wilf. 220. it was expressly ruled, that where the landlord defends, the tenant must be proved to be in possession of the premises; for it was said that he does not admit himself to be landlord of any premises but of such only as are in the possession of his tenant.

(a) *Vide tam. Goodright v. Rich*, 7 Term Rep. 333. where that case was overruled. There Lord Kenyon alluded to the principal case as having been ruled by him

upon the home circuit on the authority of *Jeffer v. Bacchus*, but acknowledged his having adopted a contrary opinion upon reflection.

EYRE Ch. J. Perhaps this verdict may be right on principle; but it is objectionable on the ground of many practical difficulties. If a Plaintiff serve his declaration on one of several tenants, and the one served appear and defend, he should specify in the rule for how much he defends; then if his landlord comes in, the declaration will be narrowed by the rule. But if this be omitted, as the declaration states an ouster from all the premises, and lease, entry, and ouster is confessed generally, this seems to warrant the conclusion that the Defendant will lose all to which the Plaintiff can make title. It is true, indeed, that on this theory, though the Plaintiff fail in his real object, yet he may recover other premises for which he did not intend to sue. It is therefore proper that they should be narrowed by the rule. The theory of the case in *Wilson* may be wrong; but I think the decision highly convenient.

BULLER J. The action of ejectment is founded on a fiction, and must not be allowed to work a wrong. It is brought for lands in possession; and the tenant in possession must be served. If it be brought for five hundred acres, and four hundred and ninety-nine only are proved to be in the possession of the Defendant, the odd acre cannot be recovered. Shall a Plaintiff, for the purpose of entitling himself to costs, be allowed to take a verdict for that on which he can have no writ of possession? It appears from the case in *Wilson*, that when a landlord is made Defendant his tenant must be proved to be in possession, and the Plaintiff can only recover the premises whereof he is possessed. Possession is the basis and foundation of the action.

HEATH J. The 11 Geo. 2. c. 19. s. 13. was passed to enable landlords to defend that which their tenants only could have defended before the passing of the act, viz. that of which they were in possession. The words of the act are, "If the landlord of any part of the lands, &c. for which such ejectment was brought, shall desire to appear, &c.;" that is, any part of the lands of which the tenant was possessed. It is true, the rule under which the landlord is admitted is general, and if construed literally would entitle the Plaintiff to recover more. That rule therefore must be narrowed by the act which was meant to benefit landlords, who before that time had no remedy if their tenants did not choose to defend. *Goodright v. Hart et ux.* 2 Str. 830.

ROOKE J. The Plaintiff's right to recover in ejectment is founded entirely on the service of the declaration upon the tenant in possession: he must therefore shew possession in the tenant to

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entitle himself to recover. Though the rule be general, he cannot demand premises of which the tenant is not possessed; for if the landlord could defend for a tenant not served, he might thereby contrive to deprive him of his term.

Rule absolute.

Nov. 25th.

2 New Rep. 404.
5. V.C. Jun.
412. 418. 661.
6. V.C. Jun. 201.

A. Seised in fee of the manors of Stamford 19*t.* and also of the manors of Swinford and South Kilworth, entered into marriage-articles to secure a jointure to his intended wife upon the above estates, and to make provision for younger children, and agreed to settle the Stamford estate upon his eldest son in strict settlement, subject to part of such jointure and provision; he then devised those estates, in case he should happen to die without issue, and subject to such jointure as he might make, to the lessors of the plaintiff for five hundred years, upon

certain trusts in the devise expressed; afterwards, by separate deeds of lease and release, he conveyed, 18, the Stamford estate to trustees in fee to the use of himself in fee till the marriage, with divers limitations, in puruance of the articles, and subject to a term of five hundred years, for securing part of his wife's jointure, remainder to himself in fee; 2dly, the Swinford and South Kilworth estate to trustees in fee, to the use of himself in fee till the marriage, to the use and intent that his intended wife should take the other part of her jointure thereout if she survived him, and after his death remainder to trustees for five hundred years, to secure such jointure, remainder to himself in fee; he afterwards married, and died without issue. Held that the will was revoked as to both estates by the deeds of settlement, though they were consistent with the provisions of the will, and though the testator took back the estate he parted with by the same instruments; and also held that the latter estate was not excepted from this revocation by the circumstance of the conveyance of that estate to the trustees, being merely for the purpose of creating a term to secure the wife's jointure.

GOODTITLE on the several demises of HOLFORD, JER-
VOISE, and CAVE, Bart. v. OTWAY,

THE facts of this case having twice appeared in print; 1st, in the report of the trial at bar, 2 H. Bl. 516. and 2dly, in the report of the case in error, 7 Term Rep. 399. they are here altogether omitted. There were two arguments in this court; one in Trinity Term 1795, by Williams Serjt. for the lessor of the Plaintiff, and Heywood Serjt. for the Defendant; and another in Easter Term 1796, by Le Blanc Serjt. for the former, and Adair Serjt. for the latter; but as they were much commented upon in the following judgments, (each of which comes from the highest authority,) they are not inserted in this report.

The Court took time to consider of their opinions; and on this day delivered them *seriatim*, there being a difference upon the bench.

ROOKE J. On this verdict it appears, that Sir T. Cave made his will and devised all the premises contained in the declaration to trustees in fee upon certain trusts and uses; that he afterwards, by two deeds of lease and release, conveyed the same premises to trustees in fee upon certain other trusts and uses, with remainder to the use of himself in fee, and that he died without republishing his will.

The question is, Whether by both or either of these deeds the devise of the premises contained in either of the counts in the declaration is rendered ineffectual; or, according to the common language of our books, is revoked?

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To decide this question, it is necessary to consider the general nature and effect of a will of lands. A will of lands is a conveyance authorised by the *stat. 32 H. 8. c. 1.* It is not to be considered as a declaration of uses, or as conveying uses which are executed by the *stat. 27 H. 8. c. 10.* It is a conveyance of the land itself; or, in the words of Lord *Trevor Fitzg.* 239. it is a provision and direction by the testator how his *estate and land* shall go when he can keep them no longer. This is plain from the words of *32 H. 8. c. 1. s. 1.* "Every person having lands, &c. may give, dispose, will, and devise, as well by last will and testament, in writing or otherwise, by acts lawfully executed in his life, all his said lands, &c. at his free will and pleasure." No interest passes till the death of the testator. When he dies the will conveys to the devisee such interest as the testator has devised to him out of that estate or legal interest of which the testator was seised when he executed the will; but under this restriction, that the testator has continued to be seised or possessed of it from the time of executing the will to the hour of his death. To understand this operation of a will, we must bear in mind, that in contemplation of law there is a distinction between, first, the land itself; secondly, the legal fee-simple or possessory right of inheritance in the land; and thirdly, the use or equitable right of inheritance. A man may at this day make a conveyance of the fee-simple of his land, without parting with the actual possession; and though the legal fee will pass from him, yet it may be revested in him, under the statute of uses, together with his old use or right of inheritance. But though he is seised of his old uses, still if he has by any conveyance for one moment passed away the fee-simple of his land, the law considers him as having *another* seisin, and not the *same* which he had before he made the conveyance.

If, therefore, a testator having executed his will, conveys away his whole fee-simple, though it be to his own use, and though he is seised again of his old use, yet, according to the rules of law, as I understand them, this conveyance renders the will ineffectual; not because the testator intended to revoke it, but because by the rules of law it cannot operate; for he has altered his legal seisin. The rule is laid down by Lord *Trevor Fitzg.* 240. "One necessary qualification which goes to the power of disposing by will, is the ownership of the land: the law requires that to be complete at the time of making the will. Consider, as to this point, the law is very strict that the testator should have a disposing power at the time of

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this case, if it stood alone, or long series of authorities from very early time, forbids us at this day to doubt the principle, which is supposed to be established by it, *viz.* that a feoffment or alienation, and taking back, is a revocation of a prior will. *Dyer* (fo. 143. P. 3 & 4 *Ph. & M.*) cites the case 44 *Ed. 3.* and considers it as a settled point that the will is void, without a new agreement; because the alienation was a disagreement to it; and without other express agreement it shall not be taken as his last will, for it was once revoked. That a man must have the lands at the time he devises them has been long settled; it was so agreed in *Butler* and *Baker's* case, *M. 33 & 34 Eliz. 3 Co. 30. b.*; and was the common law of the land, as to customary devises, before the statute 32 *H. 8.* Lord *Mansfield* assigns this reason for it: That a will is in the nature of a revocable appointment or limitation of the land, *mortis causa*; and is not, like the *Roman* testament, a constitution of an heir. 3 *Burr. 1497.*

But the question in the present case is, as to the change of interest, though the testator dies seised of the same uses which he had at the time he made his will. The cases are strong to shew that this is a revocation. In 1 *Roll. Abr. 615. Q. pl. 1.* is this case: "If a man "devises lands to J. S. and after makes a feoffment in fee thereof "to a stranger, to the use of himself in fee, though he has his "old estate, yet it seems this is a revocation; for his intent was "to have it by the new limitation, and by the *feoffment he passed "the estate*, and the statute revested it in him, which is as a "new purchase."(a)

Lord *Trevor* cites this case as good law, *Fitzg. 241.* Lord *Hardwicke* considers the point as settled; and he so states it in *Parsons v. Freeman*, 3 *Aik. 740.* and observes, that it is a prodigious strong case. So when a man devises lands to J. S. in fee, and after makes a feoffment thereof to another to the use of himself for life, remainder to his wife for life, remainder to his own right heirs: though here he hath his old reversion, yet it seems it was his intent to have it pass by the livery and to be in by the statute and the limitation, and so as a new purchase, 1 *Roll. Abr. 616. Q. pl. 2.* This last point is stated by *Roll* to have been settled in the case of *Montague v. Jeffries*; but according to the statement of that case in *Popham 108.* this was not the direct point in question before the Court; but, however, it is adopted by Lord Chief Justice *Roll* as good law. It is also cited by *Yelverton, arguendo Cro. Car. 24.*

(a) But the book adds; *Centra M. 38 & 39 Eliz. B. R. per Popham.*

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and not denied by the Court. *Hussey's case*, 2 *Jac.* 1. *Sac. Moor*, 789, is still stronger: it proceeds upon the same principle. *H.* a bastard having purchased a manor of the Queen, made a will and devised the manor: he then made a feoffment to the use of such persons and for such estates he had, as declared by his will, bearing date, &c. It was adjudged that the feoffment was a countermand of the will, but that the countermanded will was sufficient to declare the uses of the feoffment, so no escheat. In some of these cases, the intent of the party has been mentioned. But we must remember to distinguish between an intent to have the land by a new limitation, or as a new purchase, and an intent to revoke the will, 1 *Roll. Abr.* 615. There is a sort of revocation which does not depend on the intent of the testator; as where a man only takes back the very estate which he had devised by a new conveyance; *per Murray Solicitor General, ex-guendo Parsons v. Freeman*, 3 *Atk.* 745. b. If it is clear that the party took the land by a new purchase, the consequence of law is, that the will is annulled without any regard to the question, whether the party intended to revoke it or not? There are other cases of revocation stated in the books prior to the stat. 29 *Car.* 2. c. 3.: thus where a man has intended to revoke his will, but has made use of a mode of conveyance which was not completed: as where *A.* having devised a reversion to *B.* granted the same by deed to *C.*, this has been held a revocation, though the lessee never attorns; so where having devised lands to *B.* he bargains and sells to *C.*, and acknowledges it before a doctor to be inrolled within six months, though it be not inrolled within the time, this has been held to be a revocation; for he hath fully shewn his intent that the devisee should not have it, 1 *Roll. Abr.* 615.

But the revocation applicable to the present case is, that where the testator alters his legal interest in the land, without any intent to revoke his will. In such a case, I understand the rule of law to be, that if he conveys for years or for life, it is only a revocation *pro tanto*; but if he convey the whole fee, it entirely annuls the effect of the will, unless he republishes. This rule seems established by the cases I have already cited, and by the inferences drawn from them by Lord *Trevor*, Lord *Hardwick*, and Lord *Manfield*. And to these authorities may be added a series of cases from the time of Lord Chief Justice *Roll* to this day; all of which appear to have been decided upon this principle. Of these, *Dister v. Dister*, P. 35 *Car.* 2. 3 *Lev.* 108, was a case of ejectment,

ejectment, and special verdict found. Tenant in tail made his will and devised his land; and after, by bargain and sale inrolled, conveyed away the land to make a tenant to the *præcipe*, against whom a common recovery was had, with voucher of tenant in tail to the use of himself in fee. Whether by this recovery the will was made good, so that by virtue thereof the devisee should have the land, or whether the devise was revoked by the recovery, was the question: And by *Pemberton Ch. J.* and the whole Court, it was adjudged, upon argument, that this was a revocation; for, by the bargain and sale and recovery, *the whole estate was changed and altered* after making the will; yet here is no change of the use; for if he inherited the intail *ex parte maternā*, the estates shall descend to his heirs *ex parte maternā*; see the case of *Martin ex dem. Tregonwell v. Strachan and others*, reported correctly 5 *Term Rep.* 107. in the note. The cases of *Lord Lincoln (a)*, *Parsons v. Freeman (b)*, and *Sparrow v. Hardcastle (c)*, are well known, and need not to be stated at large. These in my judgment confirm the rule of law. And in *Sparrow v. Hardcastle* 3 *Atk.* 806. Lord *Hardwicke* observes, that there having been an uniform series of opinions on this point, it ought not to be varied. In *Brydges v. Duchess of Chandos (d)*, the learning as to this rule is very ably and elaborately discussed, and the point is confirmed by *Lord Loughborough*: his Lordship afferts as his own opinion, and states from a more correct note of *Parsons v. Freeman* than is given in *Atkyns*, that it was the opinion of Lord *Hardwicke*, that where the whole fee is conveyed, it is a revocation of the whole devise; where part only is conveyed, it is a revocation *pro tanto*.

To this rule there are some exceptions; but these exceptions admit and prove the general rule. The first exception is as to partition. This does not respect joint-tenants; for, if joint-tenant devises and makes partition afterwards, it does not help the devise, which was void in its creation. *Swift ex dem. Neal v. Roberts*, 3 *Burrow*, 1488. But parceners and tenants in common being seised only of their respective portions in an undivided whole, would by writ of partition retain their seisin in the portion allotted them. Now, if instead of dividing by writ of partition, which they may be compelled to do, they proceed to divide by

(a) *Eg. Cof. Abr.* 411. *Show. Parl. Cof.* 154. S. C. 202. *Freem.* 2. S. C. 3 Atk. 798. *Ambi.* 224. S. C. 7 T. R. 416. note S. C.
(b) 3 *Atk.* 741. *Ambi.* 115. S. C. 1 *Wilf.* 308. S. C. 2 *Vif. jun.* 4, cited *per L. Longb-*
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deed and fine; the law has so far indulged them, as to declare that such partition shall not revoke a prior devise, *Lather v. Kidby* (a), certified by *Raymond Ch. J., Page Probyn, and Lee, Js.*, on a reference from Lord Chancellor King, 9th April, 1730, 3 P. Wms. 169. note [B]. But the courts of law are rigid even in this indulgence; for in the case of *Tickner v. Tickner* (b), where parceners in gavelkind made partition by deed and levied a fine, and one of them declared the use to himself, and such person as he should appoint by deed or writing; and in default of such appointment, to himself in fee; Lord Ch. J. *Lee* held it a revocation; and this case is adopted by Lord *Hardwicke*, *Parsons v. Freeman*, 3 Atk. 750. There are other exceptions; as the case of a mortgage, and of a conveyance to pay debts. These, however, are revocations at law, though not in equity.

Notwithstanding these exceptions, I take it as a general rule of law, that where a testator conveys his whole interest by feoffment, lease and release, bargain and sale, or by fine and recovery, (it makes no difference which, see 3 Atk. 749.) it renders his will ineffectual at law. It is often very contrary to the intent of a testator that his will should be annulled by such a conveyance; and it often bears hard upon individuals that the rule of law should be strictly adhered to. But while it is a rule, judges are bound to adhere to it; and if it produces more mischief than good, the legislature in its wisdom may alter it. In vindication of the rule, however, we may observe; first, it is in favour of the heir-at-law, who is always an object of judicial favour; and it results necessarily from the technical operation of a legal conveyance. A will is a conveyance to the prejudice of the heir-at-law. If the law took its ordinary course, he would inherit the seisin of his ancestor. If the ancestor being seised, makes his will, and afterwards changes his seisin, it follows by technical consequence that the old seisin is at an end, and that the new seisin descends to the heir, without being affected by the prior will. Secondly, it is ancient, and as much a part of our legal system, as to landed property, as the rules which exclude the father from the inheritance of his son, and the half-blood from inheriting at all. Thirdly, it cannot operate upon one who is *inops conflixi*, or who has no opportunity of being advised; for, if a man is sufficiently strong in mind and body, and well enough affisted to execute a solemn deed which passes away his legal

(a) 1 Vins. Ab. tit. Devise, (R. 6.) pl. 30.

(b) Cit. 3 Atk. 742.

fee-simple, he surely may, if he will pay attention to it, republish his will. Fourthly, it is a plain, simple, and perfectly intelligible rule, and amounts to no more than this, that after a man has made his will, if he execute a conveyance of the legal fee-simple of the lands he has devised, he must republish his will, or it cannot take effect. If, with so plain a rule to direct them, the parties omit to republish, the disappointment of the devisees is surely not to be imputed so much to the rigour of the rule, as to the neglect of the parties, who either take no advice, or apply to such persons only as are unable to advise them properly.

Having thus stated the law as to this head, let us now see what is the case before the Court. I will first consider the two last counts which apply to the *Swinford* and *South-Kilworth* estates. The testator being seised in fee, conveys by lease and release to trustees in fee, to the use of himself till marriage; then to suffer Lady *Lucy* to receive 1400*l.* a-year; then he creates a term of five hundred years for better securing her jointure, then to the use of himself in fee. I lay the articles out of the case, for they are to be performed after marriage, and this is a voluntary conveyance before marriage; besides, if this were merely a performance of articles, it might be a case rather for a Court of Equity than for a Court of Law. I consider this as a conveyance to trustees in fee, for the special purpose of securing a jointure to his wife; had he conveyed to trustees during the life of the wife only, I should have thought it, according to the cases already decided, to have been a revocation *pro tanto* only; but having conveyed to the trustees in fee, I think I am bound, by the uniform series of authorities, to hold that the will cannot operate, or (in the language of our law), that it is revoked as to these estates. If I am right in this, the rule may be applied with equal, if not with greater force, against the claim of the devisees as to the *Stanford* estate.

I am therefore of opinion that judgment should be given for the heir-at-law (the Defendant) on all the counts.

HEATH J. (after stating the case.) We are all agreed, that the settlement of the *Stanford* estate which passed by lease and release, dated the 25th and 26th of March 1791, operated as a revocation of the devise of the same. We are divided in opinion concerning the operation and effect of the settlement of the *Swinford* and *South-Kilworth* estates, whether or no it had the same effect on the devise of those estates? The rule of law which is to govern us must be extracted from the series of authorities to be found in the books on

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this point, and for that purpose it would be material to take an historical review of the principal cases, if it had not been done by my brother *Rooke*; I shall only allude to them. Before the statute of wills, where lands were devisable by custom, if a man feised of lands in fee, devised the same, and then made a feoffment in fee, and afterwards retook a fee in the same lands, it was holden to be a revocation, *Brook*, tit. *Devise*, pl. 8. So if a man devise the use of lands whereof he had made feoffment, and took back the fee, it amounted to a revocation.

After the statute of wills when a testator, after making his will, parted with the whole fee, though part of the old use was expressly reserved to himself, or resulted by operation of law, it was still a revocation, because all re-vesting by the statute of uses operates as a new feoffment, 1 *Roll. Abr.* 615. at the bottom, and the party elected to take by a new limitation; so that he was in of a new estate. The revocation was effected by law, and sometimes against the intent of the testator, 1 *Roll. Abr.* 614, 615. In order to shew that any change of the testator's estate will operate as a revocation of his will, as well after the statute of uses as before, it will be sufficient to allude to the several cases of *Montague* and *Jeffries*, Earl of *Lincoln*'s case, *Parson v. Freeman*, *Sparrow* and *Hardcastle*, *Darley* and *Darley*(e), and *Brydges v. Dukes of Chandos*; some of these cases were decided in Courts of Law, others of them in Courts of Equity. It is on the authority of these cases that we are of opinion, that the settlement of the *Stanford* estate is *pro tanto* a revocation of the devise of the same. It remains to be discussed, whether the settlement of the *Stanford* estate essentially differs from that of the *Swinford* and *South-Kitworth* estates, so as to receive a different construction? It is material to observe, that in both settlements the whole legal fee is vested in trustees to the use of the settlor until the marriage. The subsequent limitations are mere springing uses to arise out of the legal estate of the trustees from and after the marriage. In this mode of considering the subject, this is precisely the same case as those of *Montague* and *Jeffries*, and of the Earl of *Lincoln*. The circumstance of the marriage having taken effect is totally immaterial. The revocation was complete on the execution of the deeds of settlement in the cases last cited, as well as in the present case. It is scarce material to observe, that in both of them there are several limitations made in pursuance of the articles, with an express remainder in fee to the settlor.

(e) 3 *Wyl. 6.*

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There are two cases which remain to be discussed, and which I find difficult to reconcile with each other, namely, *Luther v. Kidby*, and *Tickner v. Tickner*; both cases of partition.

In the case of *Luther v. Kidby*, it was held, that a partition by fine and deed, leading the uses of the fine, did not operate as a revocation of an antecedent devise of the same lands, though the whole fee passed. We are left to conjecture the ground of decision. It might influence the opinion of the judges, that a partition is compulsory and not voluntary. To refuse to make partition is stated in the writ as an injustice. It had been held that a partition by a writ did not operate as a revocation of an antecedent will, because the land is not in demand, but the writ is merely brought to affirm the possession, as it is expressed in *Dyer* 79. b. or to ascertain the possession as it is expressed by Lord *Hale* in his commentary on that passage, in his note on the writ *de Partitione facienda*, in *Fitzherbert's Natura Brevia* (a), and the legal estate of the parties is not revoked by the judgment. It might have been the opinion of the judges that a partition by deed ought not to have a greater effect than a partition by writ, and that no act of the testator that was not merely voluntary, ought to operate as an implied revocation of his will. However that may be, I find it difficult to reconcile it with the case of *Tickner v. Tickner*, which only differs from it in reserving a power of appointment. Though the execution of the power would operate as a revocation of a will, yet I doubt very much whether the mere revocation could have that effect. A power unexecuted seems to be the same as no power at all. It is material to consider, whether this reservation makes any real difference. In the case of *Montague and Jefferies*, it was ruled, that covenant to make a feoffment was no revocation of a writ though the feoffment itself was so. The case of the covenant is much stronger than that of the power; for the covenant declared the intention of the testator to do an act inconsistent with the antecedent devise: but the power was simply a reservation by the grantor of part of his ancient dominion over his property; the execution of it is merely optional, and it has no effect until it is executed. We are relieved from considering the effect of such deeds which pass the fee-simple, and yet are made for partial and particular purposes, because it is a consideration which belongs to a Court of Equity, and of which we can take no cognizance. Though in many instances the

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Courts of law take notice of the use, yet they never do it in deciding on the power of devising or revoking a devise. Thus, for instance, if a testator seised in fee of lands descended to him *ex parte materna*, after devising the same, make a feoffment thereof to his own use, it operates as a revocation of his will according to the authorities before cited, nevertheless at the death of the testator the lands descend to his heir *ex parte materna*, *Co. Lit.* 13. a. The reason is this, that before the statute of uses the heir *ex parte materna* of the feoffor in the case put, was intitled to the *subpoena* against the feoffee; afterwards when the statute of uses was enacted, which executed the possession to the use, the legal estate had the same descendible quality as the use, so that the judges must of necessity take notice of the use. The statute of wills attaches on the legal estate without reference to the use, and when the legal estate is altered, the devise is revoked. For these reasons, I am of opinion, that there exists no essential difference between the limitations in the settlements of these two estates, and I think myself bound by a series of decisions, with the single exception of the case of *Luther v. Kidby*, if that will not admit of the explanation which I have attempted to give it, to declare, that the testator, by changing the legal estate of the lands in question, though the old use had remained untouched, has thereby revoked his will.

BULLER J. The principal ground of argument relied on by the Counsel for the Plaintiff was, that the articles, will, and deed, are all to be taken as one transaction, and therefore, upon the authority of *Selwin v. Selwin*, 2 *Burr.* 1131. the deed was not a revocation of the will.

But when the present case, and the case of *Selwin v. Selwin*, are considered, I think they will appear to be as different as any two cases which can be cited.

In the case of *Selwin v. Selwin*, the deed to make the tenant to the praecipe was the most essential part of the recovery, and therefore the recovery when suffered related back to that deed, which was executed long before the date of the will. Besides we are told by Sir James Burrow (who certainly had the highest assistance in stating what he calls the probable grounds of the judgment), that one reason was, that the testator took a use under the deed of bargain and sale, which use was devisable, and therefore the point of that case was no more than that a will, made by a person having a legal estate, was not revoked by a confirmation of that estate made

by a conveyance partly executed before the will, and partly executed and completed after the will.

In this case the articles formed no part of the deed. The parties, if they pleased, might have made very different provisions in the deed from those contained in the articles, and if done before marriage, neither law or equity could have altered the deed. Though, in the present case, the deed was made in pursuance of the articles, yet it could not relate back to the date of the articles, or give the legal estate from that time; which was the case in *Selwin v. Selwin*; for when the recovery was completed, the testator was considered as having the legal estate from the date of the bargain and sale.

The will in the present case has neither an express or necessary reference to the articles, or to the settlement. It does not profess to carry the articles into execution, but is made with a more general view to the situation and circumstances of the testator and his relations. By the articles Sir *Thomas Cave* agreed only to settle the estate on his eldest son, and his heirs male in strict settlement: but by the settlement the estate is limited to the first and other sons of that marriage only; which, I presume, was the subsequent agreement and intention of the parties. The will is made *diverso intuitu*, and is not to take effect, if Sir *T. Cave* had any issue either male or female by Lady *Lucy* or any other wife. Again, the will is subject to any jointure which he might make at any period of his life, and is not confined to that jointure which he had agreed to settle on Lady *Lucy*.

If I were at liberty to form a conjecture from what appeared at the trial and from the ill state of health in which Sir *Thomas Cave* was described to be, I should conclude that his intention was, that his will should only take effect if he died before he married. But the words of the will and the special verdict do not admit of that construction, and therefore I lay that out of the question.

I also lay wholly out of the question what might have been the effect, if the articles had been recited in the will, or the will had been in any other form from what we find it on this record; for, it is upon that we are to pronounce. Whether a mere recital of an agreement, or what words would suffice to make a contingent devise to confirm that agreement, or to make other devises depending on that agreement, are points which do not arise here, and if they did, a modern authority, which I shall mention hereafter, would decide them.

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We are now to pronounce our opinions on different instruments conveying a legal estate. The articles did not convey any legal interest, and they are not noticed in the will; and therefore I think now, as I thought at the trial, that they ought not to have formed a part of the verdict, and we ought not to take any notice of them. If they are incorrect, we cannot correct them. If there be any mistake in them or in the deed, we cannot set it right, but are bound to pronounce on the effect of the deed, as it stands on this record.

This brings the case simply to the question, whether the deed make such an alteration in the estate, which Sir *T. Cave* had at the time of making his will, as to be a revocation of that will?

All the estates were conveyed to the use of trustees in fee, and therefore I can make no difference between the different parts of the property. Considering the case in this light, the point of revocation is so fully established by ancient and modern authorities, that to doubt about it at this time of day would be shaking rules of property.

The cases on this head are so numerous, that I shall only mention some of them, and those I will state very shortly. In *Roll. Abr.* 616. is this case: If a man devise lands to *T.S.* in fee, and afterwards makes a feoffment of it to another *to the wife* of himself for life, remainder to his wife for life, remainder to his own right heirs in fee, though he hath *his old reversion*, yet it seems that his intent was to have it pass by the livery, to be in by the statute and limitation, and so as a new purchase; and therefore it seems, that this shall be a revocation of the fee, as well as for the life of the wife. *Godbolt v. Freestone*, 3 *Lev.* 406. was a feoffment to the use of the feoffor for life, to the use of his wife for life, to the heirs of his body on his wife begotten, remainder to his own right heirs; and it was held, that the old use and estate should go to the heirs *ex parte maternā*; for the old use was never drawn out of the feoffor. So in *Abbot v. Burton*, 2 *Salk.* 590. where the party seised in fee levied a fine, and suffered a recovery with limitations in fee to his own right heirs; it was held, that the heirs *ex parte maternā* took, and that there was no difference between an express limitation and a use resulting by law.

There was no question in either of those cases about a revocation of the will; and the authority of *Roll's Abridgment* is left untouched. Under that authority, there is no doubt but a previous will in either of the two last cases would have been revoked by the feoffment, or fine and recovery; and so the law has been

considered ever since. The case in *Roll's Abridgment* goes beyond *Abbot v. Burton*, because, in the latter case the use was out of the party and vested in trustees, but in the former case the use never was conveyed to any other person, and it was holden to be a revocation.

In Lord *Lincoln*'s case the limitation in the deed was to the use of himself and his heirs till the marriage, which marriage never took effect, nor was ever proposed, and yet it was holden that a prior will was revoked by that deed. In *Doe v. Pott*, *Doug.* 722. Lord *Mansfield* said, the absurdity of Lord *Lincoln*'s case was shocking, but that it was law. Perhaps the misfortune in that case was, that the deed was not attacked on the ground of insanity. Lord *Trevor* in *Fitzg.* 241. puts the case thus: "If tenant in fee devise, and afterwards make a feoffment to the use of himself and his heirs; though this to some purpose is no alteration, (for he is absolute owner as before,) yet it is a revocation;" which plainly shews, that he thought the case turned on the first limitation only, without regard to the limitations on the marriage, which never took effect. It has been quoted in the same manner by other judges. *Parsons v. Freeman*, *Ambl.* 116. *Sparrow v. Hardcastle*, *Ambl.* 224.

In 3 *P. Wms.* 165. "Where a man having lands, devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though this use be the old use and the old estate, yet according to the several cases in *Roll's Abridgment*, 614. tit. *Devises revoked*, this is a revocation; and *Distler v. Distler*, 3 *Lev.* 108. was cited as in the very point; of which opinion was also the Lord Chancellor." But in the principal case the devisor was tenant in tail male, remainder to himself in fee. To the same effect is *Darley v. Darley*, 3 *Wils.* 13.

In the case of the Duchess of *Chandos* and Lady *Anna Eliza Brydges*, the facts were, that the Duke of *Chandos* on the 20th of June 1777, by articles previous to his marriage, covenanted to convey lands in such manner, that he should be seised in fee, and his wife entitled to dower if she survived him; and that he would convey all those lands to the use of himself for life, to trustees to preserve contingent remainders, remainder to the first and other sons of the marriage in tail male, *remainder to his own right heirs*. The marriage took effect; and on the 29th January 1780 the Duke by his will confirmed the articles, and devised all his real estate to his wife for life, with remainder to such person as she should by will appoint; and in default of appointment, with remainders

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mainders over. Afterwards, by lease and release, dated 29th and 30th October 1780, reciting the marriage and articles, the Duke conveyed all his real estates to trustees and their heirs, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term to raise 2000*per annum* for the Duchess for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs. It was determined both in the Court of Chancery and in the House of Lords, (where all the Law Lords attended,) that the will was revoked by the settlement of the 29th and 30th of October. That was a decision in equity; and if the will were revoked in equity *a fortiori*, it was so in law.

As to the case of partition, that is *sui generis*, and therefore if no satisfactory distinction could be made between that case and others, yet I should not hold myself at liberty upon that ground to overturn all the decisions which are to be found, and which are uniform upon this subject. But the case of partitions is materially distinguishable, and the determinations are founded wholly on that distinction. One tenant in common has a right to *his part* of the estate only, though he occupies the whole in common with others. He can sell, devise, or give that part only; and by law any one of the tenants in common has a right to have his part set out by metes and bounds if he pleases, instead of occupying in common. When his proportion is so set out, he has the same estate and the same interest which he had before, and the partition only affects the mode of occupying that estate. The ground of the decision in *Webb v. Temple, Freem.* 524. was, that there was no material alteration in the estate; and notwithstanding that, one Judge held that a partition and a fine to corroborate it was a revocation; but the partition there was not by the fine, but previous to it. If a partition by writ against the will of the testator was no revocation, it was but one step more to hold, that the same thing done by deed or fine should have a different effect. Whether that step were right or not may be a different question. In the case of *Lather v. Kidby*, in *Vin. Abr.* and 3 P. Wms. the deed, as stated, was merely a covenant to levy a fine; no interest passed by the deed to the trustees; and if the partition were made wholly by the fine, the authority of that case may be questionable, for reasons which I will state hereafter. But putting that case in its strongest light, and supposing it to be law, it goes no farther than to say that there is no difference

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between a writ of covenant to make partition, and a fine levied thereon, and a writ of partition. That transaction was solely for the purpose of making partition, and not a word is stated to shew that the Court meant to lay down any rule which could be applicable to any other case. On the contrary, it is there stated as law, "that if A. devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, that is a revocation of the will." Perhaps the case there put would not be so decided since the case of *Selwin v. Selwin*, but taking the whole of the case of *Luther v. Kidby* together, it seems as if the Court thought there was a difference between a fine for a partition, and a fine in any other case. If the fine were the operative instrument in *Luther v. Kidby*, the authority of that case seems to be considerably shaken by *Tickner v. Tickner*, and by what Lord *Hardwicke* said in *Parsons v. Freeman*, and *Sparrow v. Hardcastle*. In *Tickner v. Tickner*, the fee and the old use vested in the testator, and yet because the partition was made by means of a conveyance to a trustee, it was holden to be a revocation. I say the fee vested in the testator, because that is established in different cases. In *Doe ex dem. Willis v. Martin*, 4 Term Rep. 39. by a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates as the husband and wife should appoint, and for want of such appointment, to the use of all and every the child and children equally, if more than one as tenants in common, and if but one, then to such only child his or her heirs and assigns remainder over; the remainder to the children was held to be vested remainder in fee, liable to be divested by an appointment of the parents. Lord *Kenyon* there says, "the estate was there limited to *Bethia Willis* and to her heirs until the marriage, it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect." If the legal estate was not taken out of her till the marriage, neither was it taken out of Lord *Lincoln* by his deed, and yet that deed was holden to be a revocation. But the doctrine of the fee being vested, was settled before by Lord Chief Justice *Holt*, in *Idle v. Cook*, 2 Ld. Raym. 1150. and by Lord *Hardwicke* in *Cunningham v. Moody*, 1 Ves. 174. Now, if we apply these authorities to the case of *Tickner v. Tickner*, it is clear that the limitation in fee vested in the testator, notwithstanding the previous powers of appointment, and if it did, the deed and fine, and not the limitation of any new use,

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were the sole grounds of revocation in that case. Thus it seems to be a direct contradiction of the case of *Luther v. Kidby*; and that it was considered at the time as an impeachment of the doctrine contained in *Luther v. Kidby*, appears clear from *Amb. 117.* because Sir Tho. Raym. 240. is there referred to as *contra*; and the same thing is said in Sir Tho. Raym. as in *Luther v. Kidby*, though not determined. In *Parsons v. Freeman*, Lord Hardwicke approved of *Tickner's* case, and said it was the same as the case before him: and if there be no distinction between partition and other cases, where the partition is made by deed and fine, *Luther v. Kidby*, supposing the estate there to have passed by the fine, must fall. What were the reasons of the decision in that case we are not informed, and whether at this day it be or be not law, I think it cannot govern our present decision. If it be law, it is because partition is a single and excepted case, and it is no matter in what way it is effected: but it must be remembered, that in *Sparrow v. Hardcastle*, Lord Hardwick expressly denies any distinction on account of a particular purpose.

In the case of a partition, where no estate moves out of the party, I agree there is no revocation, but if the partition be made by fine or deed, and the estate be conveyed to a trustee, though for an instant only, and though the old use remains, I think that the latter cases establish that to be a revocation. *Tickner v. Tickner* was decided by Lord Ch. J. Lee, who was one of the Judges who concurred in *Luther v. Kidby*, and seems to be a revision and correction of his former opinion, made probably after conferences with Lord Hardwicke, who on all occasions approved of the last judgment. That decision supports all the other authorities in favour of the revocation, and plainly shews, that the cases on a pure and simple partition proceed on a different ground, and are no impeachment of those decisions which hold that any alteration or conveyance of the estate by deed subsequent to the will, is a revocation of that will. The reason of which is, that when a man makes a conveyance, he not only actually transfers the estate he has, but he means that the estate should pass under that deed, and not under any other former deed or will.

Upon the whole, I am of opinion, that there ought to be Judgment for the Defendant.

EYRE Ch. J. (after stating the case.) Though the doctrine of revocation has been carried to a very inconvenient extent, in consequence of which many wills have been cruelly disappointed,

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and many families greatly distressed; I agree, that Judges are not to be wiser than the law, and that it is their duty to declare and to execute the law as it is, and to strain nothing in order to mould it to their conceptions of what it ought to be. I therefore declare in the outset, that I distinctly acknowledge every principle which governs the law of revocation, and that I submit to the authority of all the numerous cases that are to be found in the books upon this subject in the points to which the cases go. But where the cases are urged as illustrations of those principles, and as furnishing rules for the application of those principles to the particular case now under consideration, I conceive, that without incurring the imputation of removing land-marks, or breaking in upon rules of property, I may, and that I ought to inquire, whether the cases are sufficiently uniform, or approaching in point of circumstance sufficiently near, to controul my judgment in a case which appears to me to be new in circumstance, and to depend upon a principle in the law of revocation which has never undergone much legal discussion.

To reduce the argument at once to the point in which I differ from all my Brothers, I think the case of the Earl of *Lincoln*, which having been very solemnly settled, ought not now to be open to any further discussion, and the late case on the will of the late Duke of *Chandos*, do approach sufficiently near in point of circumstance to this case, to be an authority for our deciding that the deeds of lease and release first stated in this special verdict, do amount to a revocation *pro tanto* of the will. My doubt is, upon the effect of the second conveyance by deeds of lease and release stated in the special verdict. And I conceive, that let the operation of this last-mentioned conveyance by lease and release be what it may, Sir *Thomas Cave died seised of that estate which he had at the time when he made his will*, and that there is no ground to raise a presumption in law from the conveyance, that Sir *Thomas Cave* intended to revoke his will, and therefore that his will may operate upon it. And that I may be clearly understood, I state, that when I use the words "the same estate," I do not mean to describe the identity of the land, but the quality of the estate and interest in that land. I mean to argue, that Sir *Thomas Cave* died seised of the old use to which the new *estate, right, title, and possession*, in the words of the stat. of *H. 8.* that was for a moment in the trustees under the conveyance by lease and release, had united itself not as a new estate, title, right and possession, but

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case it is obvious that the will is rather annulled, as *Wentworth* (*a*) terms it, than revoked. The language of our books, however, is, that the will is revoked. Lord *Hardwicke* in 2 *Ath.* 272. calls the extinguishing or destroying the thing devised a virtual revocation. How improperly it is called a revocation will appear from this consideration: If a testator parts with his estate, after making his will, the subject is gone, and therefore the will cannot operate: not that the will is revoked; properly speaking it is not revoked, no, not even virtually. A revoked will may be re-established by republication, but republication will not bring back the estate upon which it is to operate, and therefore it was that I said, that this is a revocation in an improper sense of the word.

By a construction on the statute of wills, a will can only operate on those estates which the testator had at the time of making the will, and therefore in pleading, it must be stated that the party was seised, that he made his will, and thereby devised the lands, and that he afterwards died so seised. If therefore the estate has been parted with after the making of the will, but comes back again to the testator with modifications of the whole interest in it, or if he should afterwards take the whole estate back again by purchase, the will could not operate upon the new estate independent of the law of revocation. The new modified estate, strictly speaking, is not the same estate; and the very same quantity of estate newly acquired, suppose it were a fee-simple, is not that fee-simple which the testator had at the time of making his will, but another derived by a different title, and perhaps descendible in a different course of descent. For instance, to put a case clear of all subtlety: suppose a man seised in fee-simple by descent *ex parte maternā*, were to sell his estate, and should afterwards think fit to buy it again (I avoid the *equivoque* of the word purchase), he would take his estate back again as a new estate, and he would take it as a purchaser, and it would descend to his heirs *ex parte paternā*; this is a legal quality inherent in a new purchased estate, and distinguishes the purchased estate from the old estate; and if we would try the estate by that test, we should be relieved from the senseless jargon of the *quasi* the old estate, which, in some of the cases of revocation, is a term used to denote something which is supposed to be neither the old estate nor a new estate, but something between both, something perfectly anomalous and unintelli-

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gible, with no legal qualities attached to it, and wholly inoperative, except for the mischievous purposes of disappointing a will.

I have stated the principles of the law of revocation as I understand them. I am also to acknowledge that there is a rule in the same law, which, whether fairly deducible from those principles, or not, has been adopted and acted upon, and is therefore become a rule of property, and for that reason is sacred. The rule is this: if the testator after making his will, make a feoffment to the use of himself in fee, or suffer a recovery, or otherwise convey his estate to the use of himself in fee, his will is revoked. When the case in *ipsofinis terminis* occurs, we have nothing to do but to state and apply the rule; but it is a very different consideration, when the rule is attempted to be applied to another case not *ipsofinis terminis*. A principle must then be extracted from the rule, or from the cases which have been decided upon the rule, in order to apply the rule and the authority of these cases to the case in judgment.

The Counsel have argued in this case, that the rule which has governed the case of the feoffment, and other conveyance to the use of the feoffor &c. in fee, is bottomed in another rule, viz. that if after the will the testator *parts with his estate for a moment, or once divests himself of his estate*, he has revoked his will; and they say truly, that this rule will reach to cases beyond the precise case of feoffment, or other conveyance to the use of the feoffor, &c. in fee. But they can find that rule exemplified nowhere but in the very cases which they supposed to flow from it. This is therefore arguing in a circle. When Lord *Hardwicke*, in the case of *Parsons v. Freeman*, 3 *Atk.* looked for the principle of this prodigious strong case, as he called it, of the feoffment, he found it to be this: "It must," says he, "arise from presumed intention to revoke the will; it must be presumed, that the testator would not have made a new conveyance without an intention to revoke his will." If this be the reason of the rule, I understand it, and I perceive very distinctly under what head of revocation I am to class these cases: they are not then anomalous or *positivi juris*, they are only applications of a clear principle in the law of revocation, that where the testator has demonstrated an intent to revoke his will he has revoked it. If any man feels disposed to reject Lord *Hardwicke's* reason for the rule, let him reject it, but then he must be content to understand these cases of the feoffment &c. as governed by a rule *positivi juris*, which is confined to those cases.

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These few observations upon the doctrine of revocation will serve to shew the bearings of my proposition, that Sir *Thomas Cave* died seised of his old estate, of that estate which he had in him at the time when he made his will, and that he has made no demonstration of an intent to revoke his will; from whence I conclude, that he has not revoked it. As to this last part of the proposition, demonstration of intent to revoke, I consider the case as destitute even of a pretence of revocation upon the ground of alteration of intention, express or implied; indeed, it was expressly laid out of the case in the last argument, and I think very judiciously, by my Brother *Adair*.

In considering the present case, for a time I felt a difficulty in my own mind as to the old use during the time when Sir *Thomas Cave* was seised of a base fee only, a fee determinable on the event of his marriage. Mr. *Hargrave*, in one of his notes in the new edition of *Coke upon Littleton* (a), has entered into a laborious discussion of this difficulty. In strict law the reverter seemed to be a possibility which vested in the releesees of these deeds: and on the determination of that base fee, when the seisin did revert to the relee for the purpose of giving effect to the rent-charge, and the term for securing it; I doubted whether the use of the fee-simple subject to that rent-charge, was to be considered as the old use, or as a new springing use; but as that use did not arise to a stranger, but was to be considered as an interest which had never been disposed of, and all this perplexity arose merely from the form of the conveyance, and after considering the case of *Abbott v. Burton*, I ultimately satisfied myself that it was the old use, and in construction of law never out of Sir *Thomas Cave*, from whom the conveyance moved, and that that is the true idea which the word "resulting" is to be understood to express. I proceed to shew that it was really the old use and the old estate of which Sir *Thomas Cave* died seised. This, I think, cannot be denied, that the intent of the parties to the conveyance by lease and release, last-mentioned in the special verdict, and the whole substantial effect of it, be its formal operation what it may, was simply to secure a rent charge of 1400*l.* a year, by way of jointure for Sir *Thomas Cave's* intended wife; and that Sir *Thomas Cave's* estate, subject to that rent-charge, was not intended to be altered or in any manner affected; and that as far as the form of the conveyance purports to alter the nature and quality of the estate, it

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(a) *Vid. p. 271. b. note 1. Head. iii. § 1.* though indeed that note is by Mr. *Butler*.

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goes beyond the object of the conveyance. Now courts of justice not only do not incline to allow the form of conveyance to operate beyond the intent of the parties, but they will be ready to adopt all manner of expedients to prevent it: and to confine the operation of every conveyance to the special purpose for which it was made. The case of *Abbott v. Burton*, which I shall have occasion to state with some particularity hereafter, may be referred to as an authority for the general doctrine; and in the case of *Parsons v. Freeman*, 3 *Atk.*, Lord *Hardwicke* applies it to the particular case of revocation, laying it down as a general rule in the law of revocation, that a conveyance for special purposes, whether it be lease and release, feoffment, fine, or recovery, shall not operate beyond that purpose, and against the intent of the party to revoke his will. In this case it must be admitted that, by the form of the conveyance, Sir *Thomas Cave* took a base fee under it which determined upon the marriage, when the seisin reverted to the relessee for the purpose of executing the only use of the conveyance, the jointure to his wife, and for that purpose only: for though the conveyance also affected to dispose of the rest of the use, I take the law to be perfectly clear that it was in Sir *Thomas Cave*, independent of that disposition. The purpose to be effected by all this form is then simply the securing a jointure to the lady whom Sir *Thomas Cave* should marry; and if this purpose had been effected by another mode of conveyance, the law is clear that the will had not been revoked. But Lord *Hardwicke* has said, that be the form of conveyance what it may, this is instrumental only if the conveyance be for a special purpose which is not revoked. I do not mean to adhere to the letter of my Lord *Hardwicke's* expression "for the special purpose," it must be a purpose which leaves the substance of the fee untouched to go according to the will, a purpose therefore not inconsistent with the will. If the special purpose require that the whole fee should even eventually be disposed of by the conveyance, then I agree the will is revoked.

Upon this single ground that this is a conveyance for a special purpose which does not exhaust the fee, but in truth leaves the fee undisposed of, and in construction of law not limited by the instrument, I take it to be clear, that this is not a case of revocation; but still it will be necessary for the lessor of the Plaintiff to make out, what he must have averred in pleading, that the testator died seized of the estate which he devised. Now, put the case that these deeds of lease and release had not even purported to limit the remainder of this estate at all; what would have become of the interest

interest in this estate, subject to the jointure, and the term created for securing it? Must not the use have resulted to Sir *Thomas Cave* as that which never had been disposed of by him from whom the estate moved? At the common law the use was always intended to be in the feoffee or conuze; and it is stated by Lord Ch. J. *Holt*, in *Ld. Anglesea v. Ld. Altham*, 2 *Salk.* 676. that for that reason, in pleading, it was never averred: whereas, if the use was to the feoffor or convisor, it must be averred. I admit, that there is in this case an express limitation of a remainder in fee to Sir *Thomas Cave*. What difference will this make? There is another proposition in law, that the use which is declared, and which would have resulted if it had not been declared, is one and the same. And this is not a dry proposition, productive of no legal consequence, the course of descent is regulated by it. For instance, the use which results would be deemed the ancient use, and if the estate were in the party by descent *ex parte maternā*, the estate which resulted would continue to descend in that course. And so it is where the use is expressly limited to the party from whom the estate moved, it will be in him as his old estate, and continue descendible to his heirs *ex parte maternā*. This is the doctrine of *Coke* upon *Litt.* fo. 13.; it is recognized and acted upon in the case of *Abbot v. Burton*, which was in this court upon a special verdict, and is reported in 2 *Salk.* 590.; and that case was recognized and a similar determination made in the case of *Martin ex dem. Tregonwell v. Strachan*, *Hil.* 16 *Geo.* 2. in *B. R.* a full note of which case is to be found in 5 *Term Rep.* fo. 107. The rule of descent, says Lord Ch. J. *Lee*, in this last case is known and will be agreed: "If a man seized as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence, shall ensue the nature of the lands; and shall descend to the heir on the part of the mother, *Co. Litt.* 13. a. 3 *Lev.* 406. *Godbolt v. Freestone*." He goes on, "and it will be the same if the limitation be by fine and reconveyance; it is still the ancient use, and there is no difference, whether upon the conveyance of an estate any part of the use results by implication of law, or whether it be reserved by express declaration to the party from whom the estate moved. And so is the case of *Abbot v. Burton*, *Salk.* 590." In *Abbot v. Burton*, they attempted to alter the descendible quality of the use by arguments drawn from the form of the conveyance which was fine and recovery. To this the Ch. Justice said, that the fine and common recovery were both to be taken as one entire

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with a term of five hundred years for securing the payment of it.

Alterations in the estate of the testator will, I admit, in many instances work a revocation of his will. It is one of the general heads of revocation; but I have said that the law is clear, that an alteration in the estate of this nature will not revoke the will. It has been settled over and over again, that a lease made for years, or even for life, after a devise in fee, will not revoke the will; both these cases are put in the case of *Montague v. Jefferies, Roll. Abr.* and agreed to be good law. And there are several modern cases to the same effect. In *Coke v. Bullock, Cro. Jac. 49.* it was held, that where A. by will devises to B. in fee, and afterwards by indenture makes a lease for years of the same land, this lease if not made to the same person, (where upon another principle it would be a revocation) shall be a revocation *pro tanto* only. They call it a revocation *pro tanto*, but this is using the word in an improper sense. The truth is, that a part of the thing devised is gone, and therefore the will cannot operate upon it. It happens that in our case there is no pretence to call this even a partial revocation, for the will purports to operate only upon that part of the fee which should remain with Sir *Thomas Cave*, after making such a jointure upon any wife whom he might marry, as he should think fit to make, in which respect this case is perfectly new in circumstance, and unlike every other case to be found in our books. And it happens too, that the circumstance in which it is new, goes to exclude all pretence for presuming an intent to revoke; for the deeds of lease and release respect nothing but that which was expressly reserved out of the will, so far from being inconsistent, or in any manner interfering with each other, *they amount in effect to one conveyance of Sir Thomas Cave's estate to those uses which he has himself declared by the will and subsequent settlement.*

These cases which I last mentioned, and have alluded to, were not denied to be law in the argument at the bar, nor was it insisted that an alteration of the estate by a mere interposition of an estate for life or years, to some stranger, would work a revocation. How is it then, that Sir *Thomas Cave's* will is revoked not upon the ground of an intent to revoke? That ground was abandoned, and, I repeat, judiciously abandoned by my brother *Adair* on the second argument. He stated the ground of the revocation to be, that a positive rule of law, settled by a series of decisions, had pronounced that certain acts done by a testator would be a revocation of his will, let his intent be what it might,

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own act remit himself in the same manner. This is not the use I propose to make of this case of disseisin. Let us pursue the subject a little further. Put the case that the party disseised dies without having entered. His will is revoked. I ask, why is it revoked? The answer is, because he has not died seised. In that case the will is not revoked because he intended to revoke it, nor because his estate was once divested; but because *he died without revesting it*, and therefore *did not die seised*, and as I conceive it is only when it is followed up with that consequence, and only in respect of that consequence, that in any case parting with the estate, independent of intent, does amount to a revocation.

For the purpose of maintaining and enforcing this doctrine, that the parting with the estate for a moment is a revocation, it was said, that the party must not only have the estate in him when he makes his will, and must die seised of it, but he must continue to have the same estate from the time of making the will to the time of his death. This proposition, to whatever extent it can be maintained, does not appear to me to advance the argument; it seems to be the former proposition in other words. If a testator must not part with his estate for a moment he must continue to have the estate; if he parts with the estate he does not continue to have it; if he continues to have it he does not part with it. There are not many possible cases in which a man could be said to die seised of the estate which he has parted with in his life-time. The case of the disseisee remitted is the only adjudged case I know of which comes near it, and that case does not touch the question; for by the aid of a fiction of law to which we are obliged to resort, we say that the estate was never out of the disseisee, and therefore he died seised of the same estate.

Pursuing the argument of my Brothers *Adair* and *Heywood*, I am ready to admit, that alterations of the estate ordinarily will revoke; in many cases they will do so because they afford an implication of intent to revoke. The man who devises the whole fee-simple, and afterwards makes a settlement of his estate, leaving himself only an estate for life, and a reversion far removed by intermediate estates, has so altered his estate, as to demonstrate that he does not mean that his will should take effect, and therefore, though, after all his alterations, there is something of the old estate left upon which the devise might by possibility operate, it is fair to conclude, that he did not mean his will should have any effect at all. This would be a revocation, but upon a ground very different from that which is taken by my brothers in their arguments: it does not proceed simply upon the alteration

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tion of the estate working by a mere arbitrariness, it is a revocation upon a solid acknowledgement of the law of revocations, a presumed intent to revoke an estate which is not powerful enough to intend to revoke and yet does revoke, without ground which we have already trodden over will shew that the estate of which the party took upon himself to do it within the scope of another principle can have declared my assent, and which indeed will cannot operate upon an estate which after making his will. It will most frequently be the estate of which the testator was seised at the time of his will, is afterwards changed by whatever modification it passes from him and returns whether the modification is produced by a will to be substantially a different estate from before, the will may be said to be revoked or to be a revocation. It may be said that it was or whether intended or not, the old estate which is taken in the room of it by a testator to be controverted, a will cannot operate on land acquired since the making of the will, the estate cannot pass. My Brother Adair in his treatise on the alteration of estates, laid it down as a rule that an estate through the channel of a trustee is true, taken literally, and understood to be by re-conveyance; which is the expression in Coke on Litt. where he speaks of a feoffor taking back an estate to him and meant to extend to the case of the re-conveyance, it is begging the question, as the fiction seems wholly inapplicable to a resulting use if it is not taken back through the feoffee, conzee, &c. but is a thing collateral to the estate of the feoffor as of; and secondly, the use which results from it is not altered, but is the old use proved, when united to the seisin, becomes think it a contradiction in terms to affect the old estate, is an altered use and an infringement of the sanction of the greatest names will not

From this examination of the argument at the bar, I am led to conclude, that there is no such positive rule of law, as that every alteration of an estate, every parting with an estate, every divesting of an estate, will amount to a revocation, but that there are certain principles which govern the law of revocation, to which the several instances which occur of alteration, of parting with, and divesting of estates, are to be referred, and by which the effect of them is to be determined. When we are trying cases by principles, the law is indeed a science. What shall we say of it, if it is to be argued with success, that if a testator having devised the fee-simple of his estate, makes a lease for years or for life, the will as to the reversion in fee is not revoked, but that if he should be so unfortunate as to be advised to do the same thing by lease and release, it shall be revoked? *It shall because it shall;* the rule is positive, and we must not presume to ask for the reason of it. It is certainly prudently done to shield it from all examination, because examination will point out the falsehood and absurdity of it. The old cases state the principles of the law of revocation most correctly. They say a will can only operate upon the estate which the man has at the time of making his will, and of which he died seized: they say by necessary consequence a will cannot operate upon an estate purchased by the testator after making his will; therefore according to the case of 44 E. 3. which my Brother Heywood states to be the oldest case on the subject, if a devisor *aliens* the land and *repurchases*, yet is the will revoked. By the way, what a refinement is it to say, that the divesting of the estate for a moment, though the party is in again of the old use, shall be a revocation? Is this alienation? Is it re-purchasing? We know them by their fruits.

They say, that if a testator intends to revoke his will, the will is revoked, and they say that all acts done by the testator after the making of his will, which are inconsistent with his will, are grounds upon which a presumption of law arises that the testator does intend to revoke his will.

Had the series of cases with which we are loaded, as they occurred, been brought fairly to the test of these principles, we should not have been at this day entertaining different opinions upon the case now in judgment, but unfortunately these principles are so jumbled together, and confounded in the cases as they are reported, that in many of them I find it difficult and almost impossible to develope the particular principle upon which they are determined. This gives them the appearance of mere arbitrary decisions;

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decisions; and then it is said, with great colour, I admit, of authority, that by a positive rule of law, certain acts done by a testator, do amount to a revocation of his will. The cases which were selected from the mass by my Brothers *Adair* and *Heywood*, will be a very good specimen of the whole; it will be necessary for me to take some notice of them, that it may be seen how far they go towards establishing this positive rule of law which they rely on. My Brother *Heywood* stated the case 44 E. 3. (which I have just now referred to) to be the oldest case on this subject. If a testator, say the books, alienes and re-purchases, yet his will is revoked. I agree that this case is good law; I rely on it as a main security to the foundation of my argument; to borrow Lord Ch. Justice *Wilms*'s metaphor, it is my polar star. If a testator *aliens* and *re-purchases*, I agree that his will is revoked: but if he dies seised of the same estate, I am of opinion, that he has neither aliened nor re-purchased. My Brother *Heywood*'s next case was *Winkfield*'s case, Mich. 29 Eliz. in C. B.; it is reported in *Owen* (a), *Goldborough* (b) and *Godbolt* 132. I cite it from *Godbolt*. *Winkfield* devised lands in *Norfolk* to one *Winkfield* in *London*, goldsmith, and to his heirs in fee, and afterwards he made a deed of feoffment thereof to divers persons unto the use of himself for life, without impeachment of waste, remainder unto the devisee in fee; but before he sealed the deed of feoffment he asked one if it would be any prejudice to his will; who answered no. And the devisor asked again if it would be any prejudice, because he conceived he should not live until livery was made: and it was answered, no. Then he said, he would seal it; for his intent was, that his will should stand; and afterwards livery was executed upon part of the land, and the devisor died. *Rhodes* and *Periam*, Justices—The feoffment is no countermand of the will, because it was to one person, but, perhaps, it had been otherwise, if it had been to the use of a stranger, although it were not executed. *Anderson* C. J. and others—The will is revoked in part where the livery is executed; and he said, it would have been a question if he had said nothing. And all the Justices agreed, that a man may revoke his will in part, and in other part not, and he may revoke it by word, and that a will in writing may be revoked by word. *Periam* said, *it is no revocation by the party himself, but the law doth revoke it; to which Windham agreed, but he said, that if the party had said nothing when he sealed the feoffment, it had been a revocation of the party, and not of the law.* *Periam*—If the witnesses die so as he can-

(a) P. 76. there called *Gibson v. Mutys*. (b) P. 32. there called *Gylfer v. Blatfie*.
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not prove the words spoken at the sealing of the feoffment, the feoffment will destroy the will, and so he spake to *Anderson* who did not deny it. All this was delivered by the Justices upon evidence given to a jury at the bar. From this conversation, in the shape of directions to a jury at a trial at bar, in which they seem to have mooted rather than to have gravely resolved any point of law, it may be collected, that the distinction between a revocation by the party, and a revocation by operation of law, was at that time sufficiently familiar. The doubt which seems to have arisen was, whether so much of the lands included in the feoffment, whereof no livery had been made, would pass by the will or not. I collect, though it is not distinctly stated, and though some of the Judges thought that the express declaration would prevent the incomplete part of the conveyance from operating as a revocation, in which the good sense of the case was certainly with them, that the Judges were ultimately of opinion, that the lands would not pass, but upon what principle they meant so to resolve it, is not stated in the case, nor does it seem to have been agreed. But reduce the case to its principle, and it will be found to be a very plain case upon very clear principles. The testator preferred that the devisee should take his estate under the feoffment in preference to his will, or why did he propose to make a feoffment? The moment he had demonstrated that preference, the will was revoked upon the ground of an implied intent to revoke it. Apprehensive that he might not live to finish the work he had begun, he desires to know, whether the making this deed of feoffment would revoke his will, saying, that he did not mean to do that. But he certainly did mean to revoke his will, if he lived to complete the feoffment: what he was anxious about was, that his will should not be revoked until the feoffment could take effect. They gave him bad advice upon this subject. The law and his wishes were in direct opposition to each other. Having once demonstrated an intention to revoke his will, that did revoke his will, not only as to that part of the estate which he had effectually given to the devisee by the feoffment, but also as to that part of it which he had begun to give him by a conveyance which never took effect, because he died before the livery was completed. This is supposed to be a case in which the will was revoked by operation of law against the intent of the party; the contrary is the truth. The testator did intend to revoke his will, but he also meant to make terms with the law, that it might not be revoked till what he was doing was completed. Those terms

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will: it was adjudged, that the feoffment was a countermand of his will, but that the countermanded will was a sufficient declaration of the uses of the feoffment, and therefore though he was a bastard, there was no escheat to the crown. This case is also a good illustration of this doctrine of revocation. The book says, that the feoffment countermanded the will, which word "countermand" is equivalent to "revoke;" in the improper sense of the word it did countermand or revoke the will, because the testator parted with his estate. This was said to be a revocation against the intent of the testator, and put as one of the strongest cases of revocation by operation of law, upon the mere ground of alteration in the estate. Whereas, first, the testator intended that his estate should pass not by his will, but by the feoffment, and secondly, it was not merely because the estate was altered that the will was revoked, but because it was so altered, that according to the rules of law, which govern the operation of wills, it was absolutely impossible that the will could operate as a conveyance of the estate, for this unanswerable reason, because the testator did not die seized of it: yet was not his will revoked in the proper sense of the word altogether; and even as to these lands, it could not operate as a conveyance of the estate, for the reason I have assigned, but it was allowed to operate as a declaration of the use of that very instrument which had prevented it from operating upon the estate itself; whereas, if the will had been actually revoked in the proper sense of the word as to this manor, it could have had no operation at all. The Court of *Exchequer* carried this odious doctrine of revocation no further than they were absolutely obliged to go. They could not give the will effect upon an estate which was gone from the testator, but they still considered it as a will, and gave it all the effect that it could have, namely as a declaration of the uses of the feoffment.

My brother *Adair* cited a case of *Lutwrych v. Mitten*, in the Court of *Wards*, *Trin. 16 Jac. 1.* from 1 *Roll. Abr. tit. Devise*, 614. which, though not resembling the case in *Moore*, in circumstance, and though the debate upon it arose upon a point collateral to the doctrine of revocation, seems referable to the same class of cases. If a man covenant by indenture to levy a fine, and that it shall be to the use of such persons as he shall name by his will, and afterwards makes his will, and thereby devises his land to certain persons, and after that levies a fine in performance of this covenant, this is said to be a revocation of the will, though it was levied in performance of the covenant which was entered into before the making the will.

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will. The reason given is, that the land cannot pass by relation to the time when the covenant was made, but only to the time when the fine was levied. Now this appears to me to differ in circumstance from the case in *Moore*, but as far as it concerns the present argument to be in effect the same case. Here the fine was levied in pursuance of a covenant to the use of such persons as the party should name by his will; there the feoffment was made without any such covenant, but to the same uses. That seems to have been admitted here, which was resolved there upon debate, that by the fine made after the will the lands passed, and that this countermanded, revoked, or annulled, by whatever name we call it, the will. If the land did pass, I have agreed, that this would be the consequence. There was a struggle to avoid the consequence, by giving the time of the estate's passing from the devisor a relation back to the time of the covenant. The Court thought that could not be, and I am not at present called upon to debate that point, as I agree with my brothers, that the articles stated in this special verdict are to be laid out of the case. The debate might, I think, have taken a turn more favourable for the devisee, if upon the authority of the case in *Moore*, they had insisted that the will was a good declaration of the use of the fine.

One other old case was referred to in the argument, which I take to have been the case of *Montague v. Jeffries*, and it is to be found in *Roll's Abridgment*, under the same title *Devise*. The case is put two different ways. If a man devises lands to *J. S.*, and after makes a feoffment in fee thereof to a stranger, to the use of himself in fee, though he hath his *old estate*, yet it seems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute reveseted it in him, which is as a new purchase. *Contra Mich.* 38, 39 *Eliz. B. R. per Popham*. So if a man devises lands to *J. S.* in fee, and after makes a feoffment thereof to another to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs in fee, though here he hath his *old reversion*, yet it seems that it was his intent to have it pass by the livery, and to be in by the statute and limitation, and so as a new purchase, and therefore it seems that this shall be a revocation of the fee, as well as for the life of the *Feme*. *Contra M.* 38, 39 *Eliz. B. R.* between *Montague* and *Jeffries*, *per curiam* agreed. The case first stated, appears not to have been decided with the approbation of the whole Court. My Lord Ch. Justice *Popham*, who was a very able Judge, was of a different opinion.

nion. Though he hath his old estate, says the book, yet it seems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute revested it in him, which is as a new purchase. Two reasons are given here for the judgment, and I agree with my Lord Ch. J. Popham, that neither of them is satisfactory. What is meant when it is said that a man intends to have an old estate by a new limitation, or what consequence would an intent to have the estate by a new limitation be of, if in truth, whatever was his intent, he had it not by a new limitation, but it was the old estate? By the feoffment, it is said, he passed the estate, and the statute revested it in him, which is as a new purchase, but most clearly this is not as a new purchase; that point has been decided over and over again, and so lately as in the case of *Martin v. Strachan*, by my Lord Ch. Justice Lee, in a solemn judgment upon a speacial verdict, which case I have before had occasion to take some notice of. In the second case, there was, I must confess, a new limitation, for there is an estate in remainder to his wife for life, interposed between the limitation to himself for life and the remainder in fee. If any thing turns upon this circumstance, I am not called upon to debate it, for there are in our case no such estates for life interposed. In every other respect, it is the same case with the former, supported by the same very bad reasons. It is observable, that the same point is said to have been adjudged in a subsequent case, *Cro. Car. 24.*; but there another reason is given for the judgment, namely, that because he *departed with all the estate*, it shall be a revocation, and shall not be good without a new publication. Here the ground of the argument is shifted, and I must conclude, that it was shifted because the reasons assigned in the case of *Montague v. Jefferies* were unsatisfactory. To my apprehension, however, the reason for the judgment which is now assigned is equally unsatisfactory. I take it, that in this case, the testator had not departed with all the estate; that in the first of the two cases the whole of the old use (and which had force enough to draw to it the legal seisin which had been departed with for a moment), never had been departed with, but remained with him from whom the estate moved, and in the second case, part of the old use had never been departed with, but remained with him from whom the estate moved; and no more of the use was parted with, in either case, than what might be parted with according to the authorities which I have before referred to, and might produce a revocation *pro tanto*, without

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notice of hereafter, a revocation. The party does not die seized of the estate which he devised, and therefore, by no possibility can his will take effect. The case of *Galton v. Hancock*, reported by Mr. *Tracey Atkyns*, in his second volume 425. was determined by my Lord *Hardwicke*, upon the same principle of necessity. There one devised his lifehold estate, and afterwards purchased the reversion in fee; the lifehold estate merged and was gone, and the will *pro tanto* revoked. Some older, and some still more modern cases, have proceeded upon the same principle. *Cestuy que trust* devises his trust estate, and afterwards gets in the legal estate in which the trust merges; the thing he devised is gone; the will is therefore revoked at law. There is an older case which is stronger, and not quite a clear case, but it proceeds upon the same principle, and therefore I take notice of it. *Cestuy que use*, before the statute of H. 8. devises the use, then comes the statute of H. 8. which unites the seisin to the use; the use merges and is gone: the thing devised being gone the will is revoked. This is certainly the reason of the determination, though it is not so expressed. The judges are only made to say that the will is revoked, because the King's subjects are parties to an act of parliament, and bound to take notice of it. (a).

The Counsel then put the case of a testator, who, after his will made, surrenders his lease for lives, and accepts a renewal, which has been held to be a revocation. We are now approaching to modern decisions, and I must agree, that hard as this case is, such is the law. A part of the case of *Marwood v. Turner* was decided on this very point. The surrender puts all out of the testator that he had, and he never gets that back again; of necessity, therefore, his will is annulled. That which it should have operated upon is gone, and that which he has acquired in the room of it, it cannot operate upon: this is a revocation, therefore, upon the most acknowledged principles of revocation. But I cannot conceive that this case has the most remote application to the present. The surrenderor of a lease means to part with all that he has, and to accept an equivalent for it. Sir *Thomas Cave* did not mean to part with his estate, and had nothing but his own, the very thing he had before, after he had made his conveyance.

Among the modern cases which have been cited, the case of Lord *Lincoln* stands first in point of authority, as a determination by a very great man, Lord *Somers*, assisted by the Judges

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of the *King's Bench*, upon great consideration, and afterwards in the dernier resort, (for the judgment was affirmed in the House of Lords) after a struggle and against the wishes, as far as Judges were at liberty to entertain wishes, of all those who concurred in the decision. A determination extorted from them by the stubborn and inexorable rules of law. The case, as it is stated in *Shower's Parliamentary Cases*, was this: *Edward late Earl of Lincoln*, by his will devised his estate to go with the honours of his family, and afterwards by deeds of lease and release of 27th and 28th April 1691, conveyed his whole estate to the respondents, *Davenport* and *Townsend*, and their heirs, to the use of him and his heirs, till his then intended marriage should take effect, and after such marriage had, then as to part, in trust for his intended wife and her heirs and assigns for ever; and as to the rest in trust, to permit the said Earl to receive the profits during his life, and after his decease to sell the same for the best price, and out of the money raised by sale, to defray the funeral expences and pay his debts, and deliver the surplus (as he should by his last will and testament in writing, attested by three witnesses, or by another deed in writing so attested,) appoint; and for want thereof to the executors and administrators of the Earl; with a proviso that the said Earl by his last will and testament, or any other deed in writing, (to be by him thereafter made and executed and attested as aforesaid) might alter, change, determine, or make void all, or any of the trusts aforesaid. And for want of such after to be made will or deed, then in trust for the said Earl *Edward*, his heirs and assigns for ever. There is some perplexity in this statement of the proviso, and I think it is not to be found in the statement of the case in *Equity Cases Abridged*, and therefore, most probably, whatever it was, it was thought to have no effect upon the question. Earl *Edward* died without issue of his body, and without the marriage taking effect. The appellant exhibited a bill to have the said deeds of lease and release set aside, and to have the will executed. The prayer of the bill is probably more correctly stated in *Equity Cases Abridged* to be, to have the redemption of a mortgage, and the conveyance of the estate; and there was a cross bill by the co-heirs of Earl *Edward* with a prayer to the same effect. It seems to have been admitted on all sides that at law the will was revoked; the struggle was, whether upon equitable grounds the effect of the revocation at law could be avoided, and the devisee let in to redeem as standing in the place of the testator. In this respect this case resembled that of *Lutwyck v. Mitten*,

v. *Mitten*, upon which I have already observed. In a case so circumstanced we are not to expect a very accurate examination of the grounds upon which this revocation at law was supposed to stand, and in this respect, therefore, this case, however solemnly adjudged, goes but a very little way indeed towards ascertaining the principles upon which the revocation at law stood. The ground was stated very shortly indeed by those who argued for the plaintiff. It was rather alluded to than stated that the reason upon which the law goes in judging it a revocation is, that the lease and release is a conveyance of the estate and so *ex necessitate rei* a revocation of the devise.

This did very well for the occasion when very little discussion was likely to take place, and though very loose and incorrect in the expression, was not far from being precise and accurate. The proposition taken literally imports that every lease and release is a conveyance of the estate, and as such *ex rei necessitate* is a revocation. That proposition is certainly not true; but if we understand the words to import, that the deeds of lease and release in that particular case were such a conveyance of the estate as *ex rei necessitate* would be a revocation, the proposition is true and stands upon very solid ground, for all these revocations which proceed upon the ground of alteration of estate are *ex rei necessitate*, and stand upon no other ground whatsoever. They are implied revocations, and there is not a maxim in our law better established than this, that all implications are *ex necessitate*; upon any other ground they would be capricious and arbitrary. When the estate is so conveyed as to undergo such an alteration, that is no longer the same estate, and therefore the party does not die seised of that estate which he had at the time of making his will; it becomes impossible consistent with the rules of law for the will to act upon it, and this is all that is meant when it is said that *ex rei necessitate* the will is revoked, and such was this case of Lord *Lincoln*. By his lease and release, he who had the absolute fee-simple in him (or what was considered as precisely the same thing, an equitable estate of fee-simple in him,) converted that absolute fee-simple into a base fee, and if that base fee had happened to determine by the marriage taking effect, the whole fee-simple was immediately taken out of him by force of the conveyance for ever; he never could get back that fee-simple again which he had at the time of making his will; if he died unmarried, he died seised of a base fee; if he married, the whole estate beyond his life interest was taken out of him and vested in the trustees for the purposes of the settlement,

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with no use either declared or resulting to himself. It was impossible he could die seized of his old estate; it was therefore most true, that *ex rei necessitate* these deeds of lease and release were a revocation of his will. With this explanation I agree that Lord Lincoln's will was revoked, and upon the authority of that case, as far as it goes, I argue that Sir Thomas Cave's will was not revoked. *Ex rei necessitate* that will could not take effect; there is no such necessity occurs in this case. My Lord Lincoln did not die seized of his old estate; Sir Thomas Cave did die seized of his old estate, the charges which were introduced by the subsequent conveyance upon it being such as in no case could amount to more than a revocation *pro tanto*, and in this case did not touch the will at all. If it should be said that Sir Thomas Cave's will resembles that of Lord Lincoln in this particular, that Sir Thomas Cave also did for a time take a base fee by force of these deeds of lease and release, I say that the difference between the two cases is, that Sir Thomas Cave's base fee determined in his life time, and he was in effect, though not according to the strict letter of the law, remitted to his old fee of which he died seized, whereas Lord Lincoln's base fee did not determine in his life time; he never did get back his old estate, and he died seized of that base fee. This is the technical difference; the substantial difference is, that the whole effect of the lease and release in the one case respects the jointure only, whereas the instruments in Lord Lincoln's case were intended to make a disposition of the whole fee. My opinion, therefore, upon the present case does not in the least interfere with this famous case of the Earl of Lincoln.

In the case of *Marwood v. Turner*, which I have already observed is in principle the same case as *Dijier v. Dijier*, the argument for the revocation is thus summed up by Mr. Peere Williams:—“With respect to the freehold estate, the common recovery, and the deed by which the premises were conveyed to trustees and their heirs, declaring the use of the recovery to Sir Harry Marwood and his heirs; these being all subsequent to the will, and inconsistent therewith as declaring the premises should go to his heirs at law, and not to his devisee; it seemed to be not much opposed, but that the same were a revocation. Besides, a common recovery, as it is a solemn conveyance upon record and stronger than a feoffment, must needs be a revocation; the recovery being suffered by the tenant in tail plainly gains an absolute fee derived out of that estate tail, and which fee was never devised; consequently

"quently it must be even stronger than the case where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though this use be the old use and the old estate, yet according to the several cases in 1 *Roll's Abr.* 614, title "Devises revoked," this is a revocation; and the case in 3d *Levins* 108. *Dister v. Dister*, was cited as in the very point, of which opinion was also the Lord Chancellor." Of what opinion was the Lord Chancellor beyond the conclusion from this argument that the will was revoked I am not able to collect. The conclusion I agree to. The premises (beyond the state of the fact) are some very good reasons, and, as it appears to me, some very bad ones. The common recovery, and the deed to lead the uses of it, declaring the uses to Sir *Henry Marwood* (who suffered the recovery,) and his heirs, being all subsequent to the will and *inconsistent therewith*, as declaring the premises should go to his heirs at law, and not to his devisee, appears to me to be a very bad reason; they declare no such thing, they are mere words of limitation. "The recovery being suffered by the tenant in tail plainly gains an absolute fee," (I will not quarrel with the words "derived out of that estate tail," though they are not quite correct,) "and which fee was never devised," is a very good reason, and, as I take it, the true reason of the decision, and that which brings it exactly within the scope of the case of *Dister v. Dister*, which was cited as in the very point, as it certainly is. When this case is stated as being a stronger case than the case where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, I confess I cannot perceive it. In truth it is neither stronger nor weaker than that case considered as a case neither depending upon the intent or inconsistency with the will, or upon that much better ground that the fee which was gained was never devised: and considered as the same case it rests merely on the authority of those cases in 1 *Roll's Abr.* 614, upon which I have already observed.

Several other modern cases were cited for the Defendants as authorities applicable in their principles, or rather in the *dicta* which are scattered through them with great profusion, to the present case to prove that Sir *Thomas Cave's* will was revoked. I do not mean to controvert the decision in any one of them from the Earl of *Lincoln's* case down to *Darley v. Darley*, and to the last case on the will of the late Duke of *Chandos*; but I com-

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complain of the statement given in some of the reports of the reasons of the judgment, which are sometimes so contradictory, that not only the reasons for one judgment oppose the reasons for another judgment, but the reasons for the same judgment might be mistaken for the arguments *pro* and *con.* in the same case. That it may be seen whether I over-state this, I will refer to two cases determined by Lord *Hardwicke*. The first shall be one of the cases cited in the argument; the case of *Sparrow v. Hardcastle*, from Mr. *Ambler's Reports*. That case was rightly determined. One seised as of fee in an advowson, conveyed it to trustees on trusts, with remainder to him and his heirs. He had the fee when he made his will: he died seised of a trust estate only in remainder. This was not the same estate. Lord *Hardwicke* is reported to have said upon that occasion: "The question is, Whether the grant is "a complete revocation of the devise of the advowson or not? "The general principle by which cases of this kind are go- "verned is, that at the time of the devise, the devisor must have "a disposing capacity, and an estate in the land devised; and "that the estate must remain in the same plight and condition "to the time of his death; *even the least alteration of this intent* "by any act of his, makes it a different estate, *shews a different in-* "tention, and is therefore an actual revocation of such will, *unless* "in some special cases. And this," says he, "is laid down by "Lord *Trevor* in his argument in the case of *Arthur v. Baker-* "ham, *Fitzg.* 239." These are very strong expressions, but attend to the very next passage. "A will is only the signification "of a man's purpose how his estate shall go after his death, and "if he does any intermediate act whence it must necessarily be in- "ferred such intention did not continue, it is a revocation, "though the owner should be in, of his old use." He goes on to enumerate instances; as if one seised in fee devises, and then enfeoffs another to the use of himself in fee, though it is the old use that remains, yet it is a revocation even though no livery is made on the feoffment. So bargain and sale without enrolment. So in Lord *Lincoln's* case, where he devised to his heirs male and then intending to marry, he settles the estate on himself; he died unmarried, and the House of Lords held the settlement to be a revocation. So if a man supposing himself to be seised in fee, devises his estate, and afterwards suspecting he is only tenant in tail, suffers a common recovery, solely with intent to confirm his will, it is such an alteration of his estate, as amounts

to

to a revocation. The law is thus settled, and it must not now be contradicted.

It cannot escape observation that here is a heap of heterogeneous instances very different in circumstances, and depending on different principles, huddled together without discrimination. If we are to refer them to the two introductory paragraphs for their principle, those paragraphs contradict each other. According to the first, even the least alteration in the estate makes it a different estate, shews a different intention, and is therefore an actual revocation. In the other, any intermediate act whence it must necessarily be inferred that the testator's intention did not continue, is a revocation: this last is the argument on the other side, correcting the extravagance of the first proposition. No man could mean to string them together as part of a series of propositions; they are absolutely contradictory. In short, there are here the materials of an edifice worthy of that eminent builder of legal systems Lord *Hardwicke*, but all that should bind them together is left out. If the fault lies with the reporter of the case, I must say of him, though he was a laborious and judicious man, *brevis esse labore obscurus fio*. I must suppose that if we had Lord *Hardwicke*'s own words, we should have had a very different statement of the doctrine of revocation from that which we are to collect from this case. Not that every thing which was really said by Lord *Hardwicke* in this case of *Sparrow v. Hardcastle*, was likely to be perfectly satisfactory, for it is very evident, if we follow him through this case, that he had the authority of his own great name opposed to the opinions which he then held. He takes notice of his opinion in *Parsons v. Freeman* having been cited against him on one point in this case. If that case of *Parsons v. Freeman*, as reported by Mr. *Tracy Atkyns*, bears any resemblance to the case as it really passed, it is not in that one point only that the two cases are opposed to each other. The leading principle of the case of *Parsons v. Freeman*, and which runs through the whole argument is, that a conveyance for a special purpose is not necessarily a revocation, and the cases of estates for life, mortgages, &c. are instanced. This in *Sparrow v. Hardcastle* is encountered by this declaration: "I know of no ground for supposing that to be the principle upon which they" (meaning the case of mortgages and securities considered as revocations) "are founded. There is no case which has the words for a particular purpose as a reason for the determination." I do not quarrel with the determinations in either

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cation. The case of a feoffment, where the testator takes back the old use is a prodigious strong case. That construction must arise from a presumed intention that the testator would not have made a new conveyance without an intention to revoke his will; but this must be understood with restrictions and limitations. If the conveyance or recovery be for a particular purpose, then it shall revoke no further than to answer that purpose, as where a testator creates an estate for years or for life, in the lands devised, it shall operate no further. This is the rule of law." He then enters very largely into the question whether this should be considered as a revocation in equity, into which I should not follow him, but the course of the argument being, that equitable and legal estates are revoked upon the very same principles, part of the argument on this head becomes material. He goes on thus: "I am of opinion that the same conveyance which would be a revocation of a devise of a legal, would be equally a revocation of a devise of an equitable estate, and it would be very dangerous to property if it was otherwise. But still the same rule holds as at law; if for a particular purpose only, it shall be understood to be a revocation *pro tanto* only. In all the cases where it is a conveyance of the whole estate in law, and is only meant for a security, the revocation shall only be for that particular purpose, to let in the incumbrance; for the testator himself has drawn the line how far the revocation shall go, and his intention is plainly shewn." Speaking of the effect of the recovery he says "Mr. Freeman took a fee differently qualified, conveyed differently, disposeable differently, and it cannot be said to be only for a *particular purpose*, and therefore I am of opinion the recovery is a revocation of the will." In this case, with all its inaccuracies, for it certainly is not correctly reported, Lord Hardwicke has gone a great way towards putting the whole doctrine of revocation, with the exception perhaps of this single case of a feoffment where the testator takes back the old use, and even that stands on the authority of decided cases on the principle of intent, upon solid ground. His introduction sufficiently marks, that at best it was a harsh doctrine. "Mr. Freeman," says he, "took a fee differently qualified, conveyed differently, disposeable differently, and it cannot be said to be only for a particular purpose, and therefore I am of opinion, the recovery is a revocation of the will." A conclusion to which I entirely agree. Lord Hardwicke takes notice to the doctrine, that a feoffment to the use of the feoffee and his heirs is a revocation: he considers

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considers it as an anomalous, “ a prodigious strong case” is his phrase, and he labours to find a reason for it. That construction, says he, must arise from a presumed intention that the testator would not have made a new conveyance, without an intention to revoke his will. If that is the ground upon which this feoffment is a revocation, the feoffment may be laid out of the case; for it is admitted that in this case the revocation does not proceed upon the ground of intent, and it is perfectly clear that Lord *Hardwicke* was of opinion that it could have no application to a case like the present, for he goes on in the very next paragraph to say, that if the conveyance be for a particular purpose, then it shall revoke no further than to answer that purpose, and he puts this very case as an instance. He says, where a testator creates an estate for years or for life in the lands devised, it shall operate no further; and, as if he meant to meet this case in every way in which it could be put, he takes occasion to observe, that whether the conveyance be made by feoffment, by lease and release, or by fine and recovery, it makes no alteration, for that is instrumental. There is a class of cases in equity on the effect of a conveyance of the whole estate in law for particular purposes. The mortgage in fee is one of them. Being meant only for a security, the revocation shall only be for that particular purpose, to let in the incumbrance. But in this case Lord *Hardwicke* is express, that this is by the same rule that holds at law: if for a particular purpose only, it shall be understood to be a revocation *pro tanto* only. The cases are uniform, that a conveyance for a particular purpose can revoke no further than to answer that purpose. It remained only for my Lord *Hardwicke* to clear up the doubt, whether if the conveyance was in a form which in order to effect the particular purpose, required that the whole estate should be for a moment parted with, that would revoke a will generally, when a more guarded form of conveyance would not have done it. He says, the conveyance is instrumental only. What difficulty then remains? For surely these deeds of lease and release were only for a particular purpose, and for that particular purpose which has been repeatedly decided to be at most a revocation *pro tanto*. The case of *Lamb v. Parker*, 2 *Vern.* 495. is a strong case of that sort; so is *Coward v. Marshall*, *Cro. Eliz.* 721. Lord *Hardwicke* shortly observes on the case of *Tickner v. Tickner*, that it was not merely to effectuate a partition, but was a new conveyance, and did not rest upon the partition only. That case is stated by one of the Counsel. *Robert Tickner*

Tickner seised in fee of the estate in question of gavel-kind, died intestate, and left two sons *Henry* and *Robert*, who entered on his death and became seised in gavel-kind. *Robert* being possessed of an undivided moiety, made his will, and devised it to his wife *Elizabeth T.* and her heirs; after making his will, by a deed of partition between *Robert* and *Henry*, and by fine, all the gavel-kind estate which *Robert* had devised, was allotted entirely to *Robert* to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment subject to the opinion of Lord Ch. J. *Lee*, who, after mature deliberation, held the transaction to be a revocation of the will. It had been solemnly settled that where *A.* and *B.* were tenants in common of lands in fee, and *A.* by will dated 25th Jan. 1719, devised his moiety in fee, and afterwards *A.* and *B.* made partition by deed dated 16th May 1722, and fine, declaring the use as to one moiety in severalty to *A.* in fee, and as to the other moiety in severalty to *B.* in fee, this deed of partition and fine was no revocation of the will of *A.*, and my Lord Ch. J. *Lee*, then one of the Judges of the court of King's Bench, appears to have concurred in that determination. The case is to be found in a note in 3 *Peere Wms.* 169, 70. The two cases differed in one circumstance only, the use of the moiety in severalty is in this case immediately to *A.* in fee, which was the resulting use, whereas in the case of *Tickner v. Tickner*, a new use was interposed, namely, such use as he should appoint by deed or writing, and that new use extended to the whole fee. This was thought to be a new conveyance, and beyond the particular purposes of partition, which was consistent with the old use.

Whether the case of *Tickner v. Tickner* was well or ill determined, it proceeded upon a distinction between that and the former case, and it affirmed the principle of the former case, which principle was certainly understood by Lord *Hardwicke* to be that the conveyance being a conveyance for a particular purpose, consistent with, and not disturbing any part of the old use, was no revocation at all, though the form of the conveyance being a fine and a deed to lead the uses of it, necessarily in point of formal operation, divested the estate of both the tenants in common in the first case, and the heirs in gavel-kind in the last for a moment, in order to the vesting of the respective moieties in severalty in those who before held them undivided. It appears that at an earlier period (see *Sid.* 90., *Keble*, 357. *Freeman*, 542.) this case of partition

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tion by conveyance, and even without conveyance had created some puzzle. Reasoning from the doctrine of a feoffment to the use of a feoffor and his heirs being a revocation, the judges could hardly deny that, consequently, a tenant in common conveying his whole interest to the confusee of a fine, in order to take it back again to himself and his heirs, would thereby revoke his will; in truth it seems a stronger case than the case of a feoffment to the use of the feoffor and his heirs, for the estate taken back is in some respects a different estate from that which was conveyed; an undivided moiety of the whole is not precisely the same thing as an equivalent in part of the land to be holden in severality; but in this instance, fortunately common sense got the better of legal subtleties, and it was held to be no revocation. We have not the argument of the four Judges of the *King's Bench* who concurred in this opinion, but if my Lord *Hardwicke* understood the ground of that opinion to be that a conveyance for particular purposes which may stand with the whole or some part of the old use was not a revocation *in toto*, I say if Lord *Hardwicke* understood it so, we may presume that this was the principle of the determination, and it was a solid principle; it had all the analogies of law to support it, and it had the authority of all the cases of partial revocations which proceed upon the same principle. They wisely determined that the purpose of the conveyance was every thing, and the form nothing, and that there was no difference as to the point of revocation between effecting the partition by lease and release, or fine and deed to lead the uses of the fine, and the doing the same thing by matter *in pais* by metes and bounds, the way in which the Sheriff must have done it if he had been called upon by writ, and in which the parties were at liberty to do it without writ. The principle of this determination ought not to be confined, and in my opinion cannot be confined to that particular case. If the parting with the estate, the dividing of the estate did not work a revocation in that case, neither ought it to work a revocation in any case in which the purpose to be effected is consistent with the will, and consistent with the nature and qualities of the estate, and leaves the whole untouched or charged only to a certain extent. This case ought not in my judgment to be called an excepted case or an anomalous case, it ought to be considered as a leading case, as proceeding upon a sound principle, which principle ought to be considered as my Lord *Hardwicke* has considered it, as a wholesome restriction and limitation of a doctrine which has been carried to a most unreasonable extent upon the narrowest of all grounds, reasoning merely technical

technical and artificial. I consider this case in its principle as a case directly in point to the present, that it is impossible to distinguish it, and supported by the authority of this case, together with the case of *Parsons v. Freeman*, I think I have made out that the authorities in our books will be better reconciled by a judgment, declaring that this will is not revoked as to the estates comprised in the deeds of lease and release in the special verdict last mentioned, which I take to be the estates in *Steinford* and *South Kilworth*, than by the contrary declaration.

Judgment for the Defendant.

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(In the *Exchequer Chamber*.)

REYNOLDS One, &c. v. DAVIES; in Error.

Nov. 26th.

ERROR from a judgment of the Court of *King's Bench*, in an action of *affumpfit* by the indorsee of a promissory note, payable to *M. M.* or order, against the maker. The declaration, after stating the making of the note and the delivery thereof to the payee, proceeded to aver, that it was indorsed to the Defendant in Error by the payee, "who by the said indorsement appointed the said sum of money in the said note specified to be paid to the said *Francis* (the indorsee), and then and there delivered the said note, with the said indorsement, so made thereon as aforesaid to the said *Francis*, by reason whereof, and by force of the statute in that case made and provided, the said *Martin* (the maker) became liable to pay to the said *Francis*, &c. and being so liable, promised," &c. In the breach a request to pay was stated to have been made on a particular day and often times afterwards. To this declaration there was a special demurrer in the *King's Bench*, stating several causes not now assigned as errors, and omitting the following one, which was now assigned on the judgment for the Plaintiff below, viz. "for that it is not in and by the said declaration alleged, nor does it thereby appear that any notice was given to the said *Martin*, or that he the said *Martin* had any notice of the said indorsement of the said note in the said declaration, mentioned to have been made to the said *Francis*, without which notice the said *Martin* was not liable by the law of this kingdom to the payment of the money in the said note mentioned to the said *Francis* as such indorsee of the said note."

In an action
on a promissory
note by the
indorsee against
the maker,
notice of the
indorsement
need not be
averred.

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Barrow for the Plaintiff in Error. The objection in this case is, that no notice of the indorsement and delivery to the indorsee is stated to have been given to the maker. The omission of notice precludes the maker from tendering payment, since he cannot know to whom it is due. Where any extrinsic circumstance creates or destroys a liability, the party affected is entitled to notice, *Rushton v. Aspinall, Doug.* 680.; where omitting to allege notice to the indorser, in an action against him, of refusal by the acceptor to pay, was held to be error. In *Hennings*' case, *Cro. Jac.* 432. judgment on an *affumpst* "to pay so much for barley as the Plaintiff should have of any other," was arrested, because the Plaintiff, though he shewed that *J. S.* after this agreement paid a certain sum for barley, yet did not aver that the Defendant had notice thereof. And the Court there took this difference, that if the agreement had been that Defendant should pay as much as *J. S.* in particular should pay, notice need not have been given, but where the person is altogether uncertain the Plaintiff to entitle himself to the action ought to give notice.

Hobroyd for the Defendant in Error. Notice in this case is not necessary: but if it be, the averment of the maker's liability and promise to pay, being followed up by an averment of a special request to pay, amounts to an allegation of notice, *Bradley v. Toder, Cro. Jac.* 228. The promise contained in the note being to the payee or order, the maker's liability attaches immediately on indorsement. In *Com. Dig.* Condition L. 9. it is said that lessee of a *feme sole* is bound to take notice of her marriage, and pay his rent to the husband. So where a lessee covenanted to deliver possession upon request to the lessor *his heirs or assigns*, and entered into a bond conditioned for the performance of his covenants, the lessor having bargained and sold the reversion to *J. S.* and *T. D.*, the lessee was, in debt on bond for not delivering the premises to *J. S.* and *T. D.*, held bound to take notice who were the assigns of the lessor. *Hengen v. Pay, Cro. Jac.* 475. At any rate, however, the promise to pay in the declaration being averred to be made to the indorsee, that promise after judgment must be taken to have been an express promise, *Atkins et Ux. v. Hill, Cwyp.* 284. *Hawkes v. Saunders, Cwyp.* 289. And if this be intended, notice becomes unnecessary.

EVRE Ch. J. No case precisely in point has been cited: and therefore we are not bound by any authority to say, that notice is essential to the gift of the action. The promise to pay contained

tained in this note is to the payee or his order: immediately then on the order being made to the indorsee the promise attaches. Nor can we add the qualification of notice to a promise which was not originally qualified with that circumstance. The case of *Brython v. Aspinall* does not apply. There the engagement of the indorser to the indorsee was raised by the law merchant, not by the positive promise of the former. In *Henning's case*, the Court thought that notice was part of the undertaking, and that it was reasonable, that the party claiming the benefit of the undertaking should shew himself entitled. This is a mere question of form: on which we think that as the maker's liability was not originally qualified with notice, it was not necessary to aver notice in the declaration.

Per Curiam,

Judgment affirmed. (a)

(a) Vid. *Bayley on Bills*, 108. where it is said to be unnecessary to aver notice of indorsement, and an anonymous case from *Prer. Reg.* 358. is cited to that effect. Also *Shipp v. Hoot*, *Cas.* 563. where this precise point was determined on demurrer to a declaration on a promissory note. In

that case *Lawrence v. Jacob*, reported *1 Mod. Cas.* 43. was cited, in which the judgment is said to have been reversed in error for this very cause; but *Forsyth J.* produced the paper-book, and said that the case was mis-reported, &c. and that the judgment was affirmed.

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END OF MICHAELMAS TERM.

RULE OF COURT.

Michaelmas Term, 37 GEORGE III.

Thursday, 10th November.

IT IS ORDERED, that from henceforth all persons who shall become special bail for any Defendant or Defendants in this Court may be permitted to justify themselves in open Court, although such persons did not actually become bail before the time that notice for their justification was delivered to the Plaintiff's attorney or agent; any rule of this Court to the contrary notwithstanding.

JAMES EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

C A S E S

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ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Hilary Term,

In the Thirty-seventh Year of the Reign of GEORGE III.

TAGG v. MADAN.

Jan. 27th.
2 Bo*s*. & Pull.
30.
If an attorney
sue as a common
person, the
Court will give
the Defendant
leave to plead
that the cause of
action arose
within the juris-
diction of the
court of requests,
together with
other matters.

THE Plaintiff, who was an attorney, having sued as a common person to recover the amount of his bill from the Defendant: the latter moved for leave to plead several matters, *viz.* *Non assump*t*h*, and that the cause of action arose within the jurisdiction of the Court of Requests:

Le Blanc Serjt. opposed the 2d plea, saying that as the Plaintiff was an attorney, he was entitled to sue in this Court. (*a*)

Shepherd Serjt. contr*à* insisted that the Plaintiff had waived his privilege by suing as a common person, and could not now therefore set it up: *Jones v. Bodecnor*, 1 *Ld. Raym.* 136. and *Crossley v. Shaw*, 2 *Bl.* 1088. where *De Grey Ch. J.* says, “an attorney may waive his privilege either when Plaintiff by suing as a common person, as in the case now at bar, or when Defendant by ‘not claiming it in a proper time or in a proper manner.” (*b*)

Per Curiam, We cannot know from this record that the Plaintiff is an attorney.

Rule absolute.

(*a*) Vid. *Gardner v. Jiffey*, *One, 2*c.** *B.R. Trin.* 25 *Geo. III. Doug.* 382. in the notes to the same effect.
2 *Wif.* 42. *Silk v. Rennett*, *un, 2*c.**
3 *Bur.* 1583. *Contra, Wiltshire v. Lloyd*, *Doug.* 381. where *Silk v. Rennett* was overruled, and *Hussey & Another v. Jordan*,

(*b*) Vid. also *Herberington, un, 2*c.**
v. Lovib, 2 Str. 837. and *Welland v. Fru-*
ment, Burnes 479. *ed. 3*c.**

P. 3d.

CHEETHAM and Others, Executors, v. JAMES WARD.

If the obligee in a joint and several bond, make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors.

DEBT on bond brought by *John Cheetham, James Grueon, Thomas Fanner, and William Ward, executors of Abraham Cheetham*, against the Defendant. On oyer craved it appeared to be a joint and several bond given by *William Ward* (one of the Plaintiffs) and *James Ward* (the Defendant) to *Abraham Cheetham* (the testator) in the penal sum of 1600*l.* conditioned for the payment of 800*l.* by the obligors, on the 24th day of *December* then next ensuing. The Defendant pleaded "That the said *William Ward* mentioned in the said writing obligatory and in the condition thereof is the said *William Ward* one of the now Plaintiffs, and not another or different person; and that after the making of the said writing obligatory, and after the said 24th day of *December* next ensuing the date of the said writing obligatory, and in the condition thereof mentioned to wit on &c. at &c. the said *Abraham Cheetham* in the said writing obligatory, and the condition thereof mentioned, duly made his last will and testament in writing, and thereby nominated and appointed the said *J. C. J. G. T. F.* and *William Ward* executors thereof, and afterwards to wit on &c. at &c. died without altering or revoking his said will, and that after the death of the said *Abraham*, to wit on &c. at &c. the said *J. C. J. G. T. F.* and *William Ward* duly proved the said last will and testament of the said *Abraham*, and took upon themselves the burthen of the (a) execution thereof, and that

" by

(a) When the obligee makes his obligor his executor, the latter is thereby discharged from any action on the bond, whether he administer or not. 20 *Ed. 4.* 17. 21 *Ed. 4.* 3. b. *Plowd.* 184. and agreed by all the Judges in *Wankford v. Wankford*, 1 *Salk.* 299. Whether an actual refusal to accept the executorship will prevent the discharge from taking effect or not, seems a nice point. In *Hargrave and Butler's* valuable edition of *Cs. Lit.* 264. b. note 1. the latter gentleman lays it down that the debt is discharged, "whether the executor accepts or refuses the executorship." This doctrine is indeed supported by the opinion of *Twyden J.* in *Abram v. Cunningham*, 2 *Vent.* 303. But three of the Judges in

Wankford v. Wankford, (where *Twyden's* opinion was mentioned,) held the contrary to be law; *Powell J.* declining to give a decided opinion on the point. In that case also *Holt Ch. J.* made this distinction, that where the obligor is appointed sole executor to his obligee, and refuses the executorship, then his debt is not discharged, but where he is appointed executor with others and refuses, if his co-executors act, his debt is discharged; and he gives as a reason for this distinction, that his refusal in the latter case is void, and cites *Lord Petre's case*, 1 *Salk.* 311. This reason is a strong corroboration of the notion that a refusal to accept the executorship does prevent the discharge from taking effect; for where the refusal is valid, there

" by reason of the premises the said debt in the said writing
 " obligatory mentioned then and there became wholly extin-
 " guished in law, and the said *James* and *William Ward*, then
 " and there became and were, and still are, and each of them
 " is wholly acquitted and discharged from the payment thereof,
 " *to wit*, at, &c. and this, &c. therefore, &c."

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To this plea there was a general demurrer and joinder.

Shepherd Serjt. in support of the demurrer. The question on this record is, whether the obligee in a joint and several bond by making one of the obligors his executor extinguishes the debt? I admit that when the bond is joint only, and the debt is extinguished as to one co-obligor it is extinguished as to the other: and also that if it be joint and several, and a release is executed to one, it will operate as a release to both. But the release in this case is not by deed, but by operation of law: for though the obligee made the obligor his executor, it is the law which makes that act operate as a release. Now in *Co. Litt.* 264. b. where the diversity between a release in deed and a release in law is treated of, it is said "a release in law shall be expounded more favourable according to the intent and meaning of the parties than a release in deed, which is the act of the party, and shall be taken most strongly against himself." Where the obligee makes a co-obligor his executor, it is improper to say, that the debt of the latter is thereby released; for if it were, not only the action but the debt would be extinguished. But that is not the case: for the co-obligor will be debtor to himself as executor for the benefit of the creditors and legatees, and the debt will be assets in his hands. *Dorchester v. Webb*, *Cro. Car.* 373. *Wankford v. Wankford*, 1 *Salk.* 303. *Brown v. Selwin*, *Cas. temp. Talb.* 240. 4 *Brown Parl. Rep.* 179. *Cary v. Goodinge*, 3 *Brown Chan. Rep.* 110. (a) The action is only gone because the debtor

there the release is ineffectual, and *à contraria*. It seems doubtful, therefore, whether the averment of the Defendant on this record, that *W. Ward took upon himself the burthen of the execution* was necessary. Where indeed the obligor makes his obligee his executor, the action of the latter is only discharged by his accepting the executorship: and there such an averment would be necessary. 20 *Ed.* 4. 17. 21 *Ed.* 4. 3. b. *Bra. Ab. Executor* 114. *Plowd.* 184. b. Sir *W. Jones* 345. *Wentworth's Office of Rec-*

center, c. 2. f. 5. *Rawlinson v. Shaw*, 3 *Term Rep.* 557. In this latter case it would also be necessary to aver that assets of the obligor to the amount of the debt came to the hands of the obligee, for without that circumstance it appears that his debt is not extinguished. *Per Holt Ch. J. and Powell J.* 1 *Salk.* 304, 305. and *Cock v. Croft*, 2 *Lev.* 73.

(a) See also note (1) in *Hargrave and Butler's Co. Litt.* 264. b.

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cannot maintain an action against himself. But though *William Ward*, in his personal character is unable to sue, the Defendant being a co-obligor he may be able to sue him in his official character. *William Ward*, as executor of *Cheetham*, may declare against the Defendant, though he cannot indeed declare against himself. Had the bond been only joint, both the obligors must have been made Defendants in the action, which would have prevented *William Ward* as executor from suing: but the bond being several he may well join himself with the other executors as a co-plaintiff in this action against one of the obligors. In the case of *Dorchester v. Webb*, the executrix of one of the co-obligors of a bond, having also become executrix to the obligee, was permitted in her latter character to maintain an action against the surviving co-obligor. [ROOKE J. cited *Hammon v. Roll*, March 202 where *A.* and *B.* being bound jointly and severally to *C.* and *C.* having released *A.*, it was held that *B.* also was discharged.] Probably the release in the case of *Hammon v. Roll* was by deed, and was therefore to be taken most strongly against the releasor; whereas in the present case there is only a *quasi* release, and it has been so called because it suspends the action. *Cro. Car.* 373.

Le Blanc Serjt. contra. This point has been already expressly decided in very old times. The case in 21 *Ed.* 4. 81 b. (a) also abridged *Bro. Ab. Executors*, pl. 118. is precisely the same as this, and in favour of the Defendant's plea. It has also been established by other cases that a release of one co-obligor by operation of law, is a release of the others (b). Thus in 21 *H.* 7. 30. it was laid down that if two be bound to a *feme sole*, and she take one of them to husband, who dies, she shall not have an action against the

(a) The case translated is as follows:
 "Note, that Copley, prothonotary, asked of Brian (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And Brian said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. Copley. Sir, the obligation is several. Brian. This does not matter; for a recovery against one of them and execution sued, will be a discharge to the others. And

"so of a discharge made to one of them &c." This case is recognized by GMI J. in *Wankford v. Wankford*, 1 *Salk.* 300. (b) In 21 *H.* 7. 29. b. it was held, that if *A.* have a right of action against *B.* and *C.* jointly, and *A.* and *B.* submit all trespasses and actions, &c. to the award of arbitrators; by the award the right of action which *A.* has against *C.* will be discharged also. And in *Wentworth's Office of Executor*, c. 2. f. 4. it is laid, that if testator make his debtor and others his executors, the debt is released; for they must appear in a suit. *Vide etiam Hargrove and Barker's Co. Lit.* 232. a. note (1.) for a manuscript note of Lord Nottingham on the subject.

other, for the duty and debt were extinguished. This last case was cited and recognized in Sir John Nedham's case, 8 Co. 136. 3d resolution, where it was held, that the committing of administration does not extinguish the debt, but that if the obligee make the obligor his executor, it is a release in law of the debt, because it is the act of the obligee himself. With respect to *Dorchester v. Webb*, the 2d resolution there, as reported in Sir W. Jones 345. shews, that where the obligee makes the obligor executor, the debt of the latter is absolutely discharged, for the reason given is, that an action personal, once suspended by the act of the party, is gone for ever. The 3d resolution of the same case is, "if the obligee make one of the obligors executor " who administers, in this case the obligor cannot sue the other " obligor although he survive, and although the bond was joint " and several." Indeed from the 4th resolution of that case, it also appears, that the only ground of the decision in favour of the Plaintiff was, that she was executor of the co-obligor, and not the co-obligor herself. In *Wankford v. Wankford* it was said by Powell J. that a personal action once suspended by the act of the party is gone for ever, and though in some cases it may be suspended and revive again, yet never where that suspension arises from the act of the party.

EYRE Ch. J. Having heard the argument in support of this plea, I am satisfied that this case may be decided in favour of the Defendant on the principle now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged (*a*). This was admitted to be the case where there is but one obligor in a bond. But a distinction was attempted between the case of a single obligor, and that of two who have become bound jointly and severally. The very point in issue was however decided in the year-book: and Brian there gives a satisfactory reason for the decision. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one, or satisfaction made by one, is a discharge of both. This puts an end to the argument that the action is not necessarily suspended as to both: for it is the effect of the suspension as to one that releases, discharges, and distinguishes the action as to both. This case, therefore, must be decided by the year-book,

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(*a*) 20 Ed. 4. 17. 21. Ed. 4. 3. 6. Dy. 140. Hob. 10. Cro. Eli. 150. Cro. Car. 373.
and Sir W. Jones. 345.

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and the principle there laid down, which has never been doubted since, whether founded in reason or not.

HEATH J. I am of the same opinion. It is of no consequence whether the release be by operation of law, or by deed demonstrating the intent of the party. For when the obligee actually releases to one as matter of favour, that release affects both.

ROOKE J. The general principle that if the action be once suspended in the case of a single obligor, it is gone for ever, is not now disputed: and the case in the year-book shews, that if the action be gone as to one obligor where two have become bound, it is gone as to both. Now the obligee has it not in his power to elect to discharge one obligor without discharging the other.

Judgment for the Defendant.

*No. 6th.
to Esq. 385.
2 B&G Full.
323.*

A ship bound for London after taking in her cargo, but before breaking ground was cut out of her port of lading in Jamaica by a French privateer, but was afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: held that the owners of the ship were not intitled to any part of the freight. Though by the usage of the trade the ship was loaded at their expence.

CURLING and Others v. LONG and Others.

ASSUMPSIT for freight claimed under the following circumstances. The Plaintiffs were owners of the ship *The Earl of Effingham*, and the Defendants the consignees of nine hogsheads of sugar shipped on board her while lying in *Salt River*, *Jamaica*, and bound for *London*. The goods were put on board on the 18th of September 1795, and four several bills of lading were duly signed by the captain. On the 2d of December following having completed her lading, the ship cleared out for her voyage. On the 31st of December, while waiting for convoy, she was cut out of the river by two French privateers, and carried out to sea, but was re-captured on the same day by a British schooner, and carried into *Port Royal*. The ship was afterwards libelled in the Admiralty Court of *Jamaica*, and appraised and sold under an order of that court. The proceeds of the sale, after deducting one-eighth for salvage, were remitted to the Defendants as agents for the several owners of goods on board. The whole of the cargo, including the goods in question, was brought to the ship in *Salt River* for the purpose of being loaded, and was actually put on board at the expence of the Plaintiffs as owners of the ship according to the usage of the *Jamaica* trade. This amounted to 310*l.* The Plaintiffs also expended 455*l.* 18*s.* according to the same usage, for the provisions and wages of the crew, between the time when the ship began to take in her loading, and the time of the capture. The Plaintiffs' demand was shaped in different

different ways so as to recover a proportion of the freight either from the 1st of * September 1795, when the goods were put on board to the 1st of January 1796, when the ship was re-captured, or from the 2d of December 1795, the day the goods were shipped, to the 1st of January 1796, the day she was re-captured; or to recover a proportion of the sums expended by the Plaintiffs as above mentioned.

The cause was tried before *Eyre Ch.J.* at the *Guildhall* fittings after *Michaelmas Term 1796*, who directed a non-suit.

A rule *Nisi* for setting aside this non-suit, and entering a verdict for the Plaintiffs having been obtained on a former day,

Adair and *Heywood* Serjts. now shewed cause and contended that no freight could be claimed, there having been no inception of the voyage, which does not commence from the loading but from the time of breaking ground; that although no express case was to be found upon this subject, yet that several passages in *Molloy* afforded a strong implication in support of this position, as *Lib 2. c. 4. s. 3.* "By the law marine chance or some other notorious necessity will excuse the master, but then he loseth his freight till such time as he *breaks ground*, and till then he sustains the loss of the ship;" so *s. 5.* "if goods are fully loaded aboard, and the ship hath *broke ground*, the merchant on consideration afterwards resolves not on the adventure but will unlade again, by the law marine the freight is due;" and in *s. 6.* it is said, that if the party agree to sail with the first wind and opportunity, "the ship departs not with the first wind and opportunity, yet afterwards *breaks ground* and arrives at her port, the freight in this case is become due, for there is nothing can bar the ship of her freight, but the not departure." They observed that with respect to the case of *Luke v. Lyde*, 2 *Bur. 882.* the proportion of freight there allowed was calculated from the day of sailing, and that Lord *Mansfield* explained "a rateable freight" to mean *pro rata itineris*; and that as here there was no "iter," so there could be no freight; that as to the usage of the *Jamaica* trade, since all the expences incurred by the Plaintiffs were to be covered by the freight, the Plaintiffs could have no demand where no freight was due.

Le Blanc and *Shepherd* Serjts. in support of the rule, argued that in a contract where part of the consideration is performed, the party is intitled to a remuneration for such part-performance, and that in *Molloy* the freight only and not the loading was considered; that the right to freight *pro rata itineris* depends on the circumstance

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stance of the *inchoate* right having commenced or not, and that this circumstance depends on the inception of the contract. They referred to the case of *Tonge v. Watts*, 2 *Str.* 1251, where Lee Ch. J. non-suited the Plaintiff in an action on an insurance for freight because "the goods were not *actually on board*, so as" "to make the Plaintiff's right to freight commence," and to the observations of Ld. Kenyon upon that and the case of *Montgomery and Egginton*, 3 *Term. Rep.* 362, in the course of his judgment in *Thomson v. Taylor*, 6 *Term Rep.* 481, 2.

EYRE Ch. J. This is a case of the very first impression; and it appears to me that the demand of the Plaintiffs is neither warranted by the marine or by the common law. The former has settled what freight is, what services it includes, and also that it is divisible, which is contrary to the principles of the common law. At common law all the expences of loading are included in the freight, and if the party be not intitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground (*a*). In the law of insurance, indeed, this doctrine is not holden so strict, for there if the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that the freight is insurable, and recoverable. But that does not affect the marine law as to freight in cases between the ship-owners and freighters, by which this case must be decided. According to that law no right to freight commences till the ship has broken ground; here the ship had not broken ground, having been captured in the river. The situation of the places where cargoes are taken in materially varies the labour, cost, and pains taken by the shipper and master. In some places there is little difficulty and expence, in others a great deal. On these circumstances, depends the price of freight; if the master incurs this cost and trouble he takes a larger freight, if the shipper, a smaller. In either case the freight is his reward. If therefore by the marine law he be intitled to no freight, he can claim no remuneration. So stands the case by the marine law. Let us now view it upon the principles of the common law. The contract was to load these goods on board and bring them to *England* for a certain price. Upon this contract, how could a declaration be framed for the Plaintiffs' demand either

(*a*) Though "breaking ground" be the usual inception of freight, yet an exception to this general rule has been stated by a writer of some authority; "In case a ship is freighted out, and in consequence of the agreement, receives her lading aboard, if an embargo happens after-

"wards, and her cargo is taken as forfeited, yet the owner shall notwithstanding receive the freight, as the fault was not in them, but in him whose property the goods were." *Petreses Lex. Mer.* 8; and with this agrees the civil law. *Dip. Lib.* 19, tit. 2. c. 61.

in *assumpsit* (*a*), or in an action on a charter party (*b*)? Could the Plaintiffs state a part-performance of the contract and insist on payment for it? This could not be done, for by the law of *England* the contract is intire and indivisible. By the marine law, indeed, parties may recover *pro rata*, if the voyage be interrupted. And by the common law where a contract *cannot* be performed such a meritorious consideration may arise as will sometimes intitle a party to recover in the form of an action of *assumpsit* for work and labour even after the contract has been broken (*c*). Such is the case where a ship after capture and re-capture completes her voyage; for there the shipper has his goods with the advantage of carriage, and upon that, though the original contract be gone, a meritorious consideration arises which intitles the master to a recompence; not, however, on the foot of the old contract, but on a new contract which springs out of it. Here the ship never arrived at the port of destination, but put into a port in *Jamaica*, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expences incurred. I am therefore of opinion, that neither by the marine, or the common law, are these Plaintiffs, however unfortunate, entitled to recover.

HEATH J. This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. If the voyage be interrupted the party may claim *pro rata*. Freight commences at the same time in all parts, since it depends on the same principle here and at *Jamaica*. It is true, indeed, that by the customs of different ports, duties more or less onerous, may be imposed on the master, and compensated by the freight. But that does not vary the principle. — This case is only new in its circumstances. The law of insurance does not apply to this case: for the mere hope or expectation of interest is sufficient to intitle the assured in a policy of insurance to recover against the underwriters. (*d*)

(*a*) This agrees with the doctrine laid down in *Cutter v. Powell*, 6 Term Rep. 320. where a sailor having taken a promissory note for a certain sum from his employer on condition of performing the voyage, died before the arrival of the ship. There the Court held, that no wages could be claimed either by virtue of the contract or upon a *quantum meruit*.

(*b*) If one covenant for such a sum to carry goods to such a place, and being pre-

vented by the act of God from delivering them at that place, deliver them elsewhere and they are accepted, yet he cannot recover upon the covenant *pro rata*. *Cook v. Jeanning*, 7 Term Rep. 381.

(*c*) Said to obiter dictum, 3 B&F. and Full. 413. *Vide 4 East, 47, 553.*

(*d*) To this effect see *Le Gros v. Hughes, Park Insur.* 269. *Crawford v. Hunter*, 8 Term Rep. 13. *W. Boehm and Others v. Bell*, 8 Term Rep. 154.

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ROOKE J. This is a new case, and therefore I take the demand not to be founded on the usage of trade. The contract in a bill of lading is for freight. The expression is, "they "paying freight;" and though the master may have been at the expence of loading, and the freight was higher on that account, yet as it had not commenced, the Plaintiffs cannot demand a recompence. The text writers all agree that freight commences from the breaking ground. This is clear and intelligible: the ship begins to earn when she begins to move; and we cannot introduce new principles. The writers also say, that there may be cases where the ship-owners may be intitled to a proportion of what the ship has earned; but that cannot include what has been earned by the master before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the sailing of the ship. Did the freight commence sooner, it might induce the master to stay a longer time in port and delay the voyage. Insurance is a contract of indemnity; the cases, therefore, which are founded on such a contract are not applicable to this case. Upon these grounds I think the non-suit right.

Rule discharged

Feb. 8th.

HOLMES and Another v. RHODES.

Non damnicatus
 cannot be pleaded
 to debt on bond,
 conditioned for
 the payment of a
 sum of money at
 a certain day,
 though it appear
 by the condition
 that the bond
 was given by way
 of indemnity.

DEBT on bond; and the common counts in debt. The Defendant craved oyer of the bond, which was a joint and several bond of the Defendant and one T.R. for the payment of the penal sum of 600*l.* to the Plaintiffs and one W.H. since deceased; and also of the condition, which was as follows: "Whereas "the above-named Plaintiffs and W.H., at the special instance "and request and for the only proper debt of the above-bound "defendant and T.R. in and by one bond or obligation bearing "date &c. became jointly and severally bound together with the "said Defendant and T.R. unto R. Wright, of &c. in the penal "sum of 600*l.* with a condition there-under written that if the "said Plaintiffs and W.H. and the Defendant and T.R. or some "or one of them their or some or one of their heirs executors "or administrators should and did well and truly pay or cause "to be paid to R. Wright 300*l.* with lawful interest for the same "in manner following that is to say 100*l.* on the 10th of Ja- "nuary 1788 with lawful interest on 300*l.*, 100*l.* on the 1st "

" of

"of January 1789 with lawful interest on 200*l.*, and the remaining 100*l.* on the 10th of January 1790 with lawful interest on the same, then the said obligation to be void: now the condition of the above-written obligation is such, that if the said Defendant and *T. R.* or one of them their or one of their heirs executors or administrators do and shall well and truly pay or cause to be paid to the said *R. Wright* his executors administrators or assigns the said sum of 300*l.* and the interest thereof on the days and times and in the manner limited and appointed in and by the condition of the said in part recited obligation and according to the true intent and meaning thereof, and thereby acquit release and discharge the said Plaintiffs and *W. H.* their and each and every of their heirs executors and administrators' goods and chattels lands and tenements of and from the said recited obligation and all sum and sums of money therein and in the condition thereof mentioned and thereupon to grow due for the same, and also of and from all actions suits payments costs charges damages and expences which may arise happen or accrue to them the said Plaintiffs and *W. H.* their or any of their heirs executors administrators or assigns for or by reason of their becoming bound with the said Defendant and *T. R.* to the said *R. Wright*, as aforesaid then the above-written obligation to be void otherwise to be and remain in full force and virtue." The Defendant then pleaded to the first count "that the said Plaintiffs have not nor hath either of them at any time since the making of the said recited writing obligatory and condition thereof hitherto been in anywise damaged by reason or means of the said recited writing obligatory or the said condition thereof. And this &c. wherefore" &c. To the other counts he pleaded *nil debet* and a set off.

The Plaintiffs replied, that they were damnified in consequence of having been obliged to pay the sum of money for which they had become jointly bound with the Defendant and *T. R.*, and also the costs of a certain action for the recovery of the same brought against them by the executors of *R. Wright*.

To this replication there was a special demurrer and joinder.

Williams Serjt. first argued in support of the demurrer; but as the Court gave no opinion upon the replication, the causes of demurrer and argument thereon are here omitted. He then contended that the bond on which the Plaintiffs had declared being in substance

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substance an indemnity bond, though not precisely expressed to be so in the condition, the plea of *non damnicatus* was therefore proper. He observed that the Defendant's bond was conditioned for the payment of the principal and interest, for which the Plaintiffs had engaged themselves, and *thereby* to acquit, release, and discharge them; that the object of the condition was indemnification, and that the having pointed out the mode by which the indemnification was to be made would not alter the nature of the condition.

Shepherd Serjt. was to have argued on the other side;

But the Court were of opinion, that the plea of *non damnicatus* was no answer to that part of the condition by which the Defendant undertook to pay the sum for which the Plaintiff bound themselves (*a*), and was therefore bad.

Judgment for the Plaintiffs (*b*)

(*a*) It seems, however, that *non damnicatus* would not have been a good plea in this case, even if the condition had not been for payment of a sum of money. For in a note to *Cutbr v. Soutbern*, 1 *Saud.* 116, by Mr. Serjt. *Williams*, this distinction is taken. Where the condition is to *discharge or acquit* the Plaintiff from such a bond or other particular thing, the Defendant must set forth affirmatively the special matter of performance: but when the condition is to *discharge and acquit Plaintiff from any damage* by reason of such bond or other particular thing, then *non damnicatus* is a good plea. See the authorities there cited.

(*b*) Analogous to this case in principle are those decisions where it has been held, that if a bond be conditioned for the payment of a sum of money at a certain day, though really given by way of indemnity, the debt accrues from the day mentioned in the condition, and does not await the indemnification. *Touffant v. Martinnant*, 2 *Term Rep.* 100. *Martin v. Court*, 2 *Term Rep.* 640. and *Hodgson and others v. Bell*, 7 *Term Rep.* 97.—Nothing shows the bond can be pleaded to show that it is an indemnity bond. *Moose v. May*, *Cowp.* 47.

Feb. 10th.

2 East, 85.

Debt on bond conditioned for J. S. rendering account to the Plaintiffs of all monies which he should receive as their agent. Defendant pleads performance in the words of the condition.

Plaintiff's reply that J. S. received divers sums of money amounting to 2000*l.* belonging and relating to the Plaintiffs' business as their agent, and hath not rendered to the Plaintiffs an account of the said 2000*l.* or any part thereof. This replication being specially demurred to for generality, was held sufficient.

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SHUM and Others v. FARRINGTON.

DEBT on bond for 2000*l.*

Upon oyer craved it appeared that the Defendant and one *Robert Spratlin*, the elder, became jointly and severally bound to the Plaintiffs, as brewers and copartners, in the above sum, conditioned for the good behaviour of *Robert Spratlin*, the younger, employed by the Plaintiffs as their agent or factor in their business as brewers, and for his duly rendering and paying to the Plaintiffs a true, and just, and fair account, payment, and delivery of all monies, bills, &c. belonging or relating to their trade as

such

such agent or factor, wherewith he should be entrusted or which he should receive or be concerned in as agent for the Plaintiffs. The Defendant pleaded that *Robert Spratlin*, the younger, was employed as the Plaintiffs' agent at *Colchester*, and averred performance in the words of the condition.

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Replication, That "the said *Robert Spratlin* the younger whilst he so continued to manage and conduct the said business of the Plaintiffs as their agent or factor to wit on the 30th of October 1793 and on divers other days and times between that day and the 1st of July 1796 at the town of *Colchester* aforesaid under and by virtue of the said appointment received divers sums of money amounting to a large sum of money to wit the sum of 2000*l.* belonging and relating to the said trade and business as such agent or factor as aforesaid, and hath not given rendered and paid unto the Plaintiffs or either of them a true just and fair account payment and delivery of the said sum of 2000*l.* or any part thereof but then and there wholly refused and neglected so to do contrary to the form and effect of the said condition And this &c. Wherefore" &c.

To this the Defendant demurred specially "for that it does not appear in and by the said replication of the Plaintiffs from whom or in what manner, or in what proportions the said sums of money in the said replication mentioned amounting to the said sum of 2000*l.* in the said replication mentioned were received by the said *Robert Spratlin* the younger."

Joinder in demurrer.

Le Blanc Serjt. in support of the demurrer. This demurrer is drawn on the authority of *Jones v. Williams and another*, Doug. 215. One cause of demurrer there was, that it was not shewn from whom the money was received; and according to my note of that case, when it was insisted upon in argument that it was not necessary to particularize the receipt, Lord Mansfield said, that it clearly was necessary, and mentioned the 8 & 9 Will. 3. c. 11. This case is stronger than that in *Douglas*, for there the embezzlement was charged as having been committed on one day, whereas here a space of three years is comprehended, and divers sums are laid as having come to *R. Spratlin's* hands without shewing whence they came. This allegation is so general that the Plaintiffs may prove the receipts in any way they please, and the Defendant cannot know what evidence it will be necessary for him to produce in order to meet the charge. The case of *French v. Pearce*,

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1 Lev. 94. (cited by Mr. J. Heath) where a general replication of this kind was held good, is open to two observations, first, that it is not the note of *Levinz* himself who was ill during the whole Term in which it was decided; secondly, that the Court said that such a replication was well enough in debt on bond where on anybreach the penalty and not the damages, was to be recovered, but that it would be otherwise in covenant (*a*), where the recompence is in damages. Now since the 8 & 9 Will. 3. c. 11. s. 8. the Plaintiff in debt on bond can only obtain damages for such breaches as he affligns (*b*): debt on bond and covenant therefore now stand upon the same footing in this respect, and this probably was Lord Mansfield's reason for alluding to the 8 & 9 Will. 3. according to my note of *Jones v. Williams*. The Plaintiffs should have specified the nature of the receipt: as whether the money was received of them, or their customers: had they alledged that *R. Spratlin* received so much in the retail way, that would have been sufficient to inform the Defendant what charge he had to meet. The parties cannot go to issue on the general plea of performance, *Sayre v. Minns*, Coup. 578. and this replication is little less general than such a plea.

Clayton Serjt. *contra*. In *Lutw.* 421. it is said by the Court that when matter tends to great prolixity, a concise manner of pleading ought to be admitted (*c*). Had we stated the account between *R. Spratlin* and the Plaintiffs, it would have rendered the pleadings intolerably prolix. Previous to the case of *Jones v. Williams*, the form of pleading was the same as that here made use of. That case was little discussed, and no authorities were cited in support of the determination. In Lord *Arlington v. Meyricke*, 2 Saund. 413. which was debt on bond for the performance of covenants, and performance pleaded, the replication was general that the Defendant had received a certain sum for letters and packets, and had not accounted for the same with the post-office, and though *Sanders* took exception to the replication upon other grounds, no objection was made to its generality. So in *Lilly's Entr.* 114 there is a precedent of the same kind. The same form was fol-

(*a*) Vid. tam. *Farrow v. Chevalier*, 1 *Salk.* 139. 1 *Ld. Raym.* 478. S. C. where *Holt Ch. J.* and *Gould J.* say, that more certainty is requisite in the replication in debt on bond than in the breach in covenant. In that case, which was covenant, the breach laid was for selling *diversis diebus et vicibus* between such a day and such a day to *H.* and several persons unknown, and it was moved in arrest of judgment that the breach

was uncertain as to times and persons; but held well enough.

(*b*) See a very full note on this subject in *1 Saund.* 58. by Mr. Serjt. *Williams*.

(*c*) Vid. etiam *Minns v. Betts*, Cr. Eliz. 749. *Braban v. Bacon*, Cr. Eliz. 916. *Crypts v. Bainton*, 3 *Bulfl.* 31. *Beads v. Pratt*, *Sty.* 420. 428. *Jeney v. Jeny*, Sir T. *Raym.* 8. and *F. Weston v. Stewart*, 1 *Term Rep.* 753. per *Buller J.*

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lowed in *Cornwallis v. Savery*, 2 *Burr.* 772. and held good on demurrer. The averment there was, that the Defendant as agent to a regiment had received *several sums of money amounting in the whole to 14,000l.* on account of the regiment, and had not paid them over. To the same purpose may be cited the several replications in *Simmons v. Langhorne* (*a*), 2 *Wilf.* 11. *Wright v. Russell*, 3 *Wilf.* 535. and *The Irish Society v. Needham*, 1 *Term Rep.* 483.

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Le Blanc in reply. None of the cases cited are authorities to govern the present. The *dictum* of the Court in *Lutwyche* must be read with this qualification: that the conciseness alluded to be consistent with justice. In *Saunders* the averment that the money was received *for letters and packets* was sufficiently precise. With respect to *Cornwallis v. Savery*, it was there averred, that the money was received from the Paymaster General, which differs it from this case, where it is not stated from whom the sums were received. There also the demurrer, though professing to be special, was in fact but general, since the epithets do not amount to an assignment of any special cause. So the cases of *Wright v. Russell*, and *The Irish Society v. Needham*, were both on general demurrer, and this point was not raised.

EYRE Ch. J. When I read this demurrer, it appeared to me a point of extreme consequence, since any departure from the general way of stating the breach used in this replication would lead to an inconvenient length of pleading, which the Court will not determine to be necessary unless compelled by a series of authorities. One decided case only has been cited; but that case does not direct how the statement should be made, for the extent of *Jones v. Williams* is, that enough was not there stated. I confess I am not satisfied that the decision of that case was consistent with the general rules of pleading. Whether a breach be sufficiently assigned or not, is to be decided by the rules of law and the forms of pleading. By the former the party must shew some fact which is a breach in the words of the condition. Where many sums

(a) *Quare inv.* For there, to debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof, non *damnicatus* being pleaded, the Plaintiff replied that he was obliged to pay such a sum by reason of such nomination, without saying how he was obliged to pay; and though the replication

was held well enough on general demurrer, the Court seemed to intimate that it might have been otherwise on special demurrer. But the circumstances of the damnification were in that case more within the knowledge of the obligee than of the obligor, whereas that observation does not apply to the principal case.

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have been received, it is not each sum, but all taken together, that constitute the breach, which must therefore be so stated. All the sums so received, are, according to the condition to be duly delivered. Here then the plaintiff states, that *R. Spratlin* has received *divers sums of money*, and has not *given, rendered, and paid, &c.* in the words of the condition. This allegation is indeed general, but from the nature of the fact it could not be otherwise. It was not contended in argument that extreme particularity was requisite, or that every sum need be stated; but it was said that the description of the receipt should have been shewn, that the money received by *R. Spratlin* must be divided into two classes, *viz.* money received from his employers and money received from the customers, and that it should have been shewn to which of these classes the sums received belonged. This, however, is but an imaginary division, for still the particulars would be unknown. The Defendant only experiences the same difficulty which occurs in all matters *in pais* which come before the Courts, especially on the general issue. This difficulty is unavoidable, for *in pais* facts may be either single or accumulated. Though the books afford no express decisions on this subject, yet a series of similar replications are sufficient to establish the form of pleading. Had the form adopted in the cases cited been thought deficient by the profession, an exception to it would certainly have been taken. None having been taken, we may infer a concurrence of opinion sufficient to outweigh the authority of one vague case like that in *Douglas*, which points out no way of framing a replication, and which necessarily tends to load the record with a multitude of allegations. I am therefore of opinion, that this replication is agreeable to the rules of law and precedents. It is a rule that issue cannot be taken on a plea of general performance, because such a plea goes to a multitude of facts, one of which the Plaintiff must select. But where a covenant relates to one fact only, issue might be taken on the plea of performance without any objection, were it not for the general rule, which requires that to such a plea the Plaintiff must reply. The argument, therefore, which has been drawn from that rule, affords no objection to this replication when the plaintiffs have shewn one breach in the words of the condition. I think we ought to discourage demurrs of this kind.

HEATH J. This demurrer rests solely on the case in *Douglas*, and the cases cited the other way prove that the rule there laid down is neither consistent with the current of authorities previous

to that time, nor has since been universally acted upon. My brother *Le Blanc* admitted that it was not necessary to state each particular sum, but according to the case in *Douglas* such a statement would be necessary, for no rule can be laid down limiting the degree of particularity to be employed. The breach in substance is, that *R. Spratlin* has not accounted for what he has received. These parties might have divided the condition of the bond into distinct parts, which would have compelled the Plaintiff to select his breach, and assign it separately. The method of averring Barratry is a strong instance of the conciseness allowed in pleading.

ROOKE J. The authorities cited of a date previous to the case in *Douglas*, shew the practice before that decision to have been in favour of this replication. It is sufficient that the breach is assigned in the words of the condition.

The Court were about to give judgment (*a*) for the Plaintiffs, but on the application of *Le Blanc*, gave him leave to withdraw his demurrer and rejoin.

(*a*) A similar case of *Barton and Another v. Webb and Another*, executors, came on in *B. R. Hill*, 40 Geo. 3. and received a simi-

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7 *Esgt.* 384.2 *New Rep.* 188.

Defendant being arrested by the name of *F. H.* put in bail by the name of *S. H.*: Plaintiff then declared thus:
 " *S. H.* arrested
 " by the name of
 " *F. H.* was at-
 " tached to an-
 " swer, &c."
 Defendant without craving oyer pleaded in statement of the writ that his name was *S. H.*; Plaintiff having treated this plea as a nullity, and signed judgment accordingly, the Court refused to set it aside.

THE Defendant in this case being arrested on a *capias ad respondendum*, issued against him by the name of *Francis Hubbart*, put in bail by the name of *Samuel Hubbart*. Upon this the Plaintiff declared against him thus: " *Samuel Hubbart* arrested by the name of *Francis Hubbart* was attached to answer *George Murray* " of a plea of trespass on the case" &c. and throughout the declaration called him *Samuel*. The Defendant pleaded as follows; " And the said *Samuel Hubbart* against whom the said original writ of the said *George* hath been sued out by the name of *Francis Hubbart* in his proper person comes and pleads that he was " baptized by the name of *Samuel Hubbart* at *Boston* in the State " of *Massachusetts* in *North America* and by the name of *Samuel Hubbart* hath always hitherto since his baptism been called and " known, to wit at *London* aforesaid in the parish and ward afore- " said; without this that the said *Samuel* now is or at the time of " suing forth the said original writ of the said *George* was or ever " before had been, or ever since hath been called by the Christian " name of *Francis*, as by the said writ is above supposed. And

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" this

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"this he the said *Samuel* is ready to verify. Wherefore he prays
"judgment of the said writ and that the same may be quashed." In support of this plea in abatement, there was the usual affidavit of the truth of its contents.

Early in this term an application was made to the Court on the part of the Plaintiff for leave to treat this plea as a nullity, and to sign judgment notwithstanding. But the Court refused to make any rule in that stage of the proceedings, saying that the Plaintiff might sign judgment if he thought proper, and leave it to the Defendant to move to set that judgment aside.

Accordingly judgment having been signed by the Plaintiff, and a rule *nisi* obtained by the Defendant to set it aside for irregularity;

Clayton Serjt. shewed cause and contended that the Defendant having appeared by the name of *Samuel*, the Plaintiff had a right to declare against him by that name. *Hole v. Finch*, 2 *Wif.* 393. and *Doo v. Butcher*, 3 *Term Rep.* 611. That this plea was a nullity, for there could be no plea to the writ without *oyer*; *Com Dig.* tit. *Abatement* (H. 1.), (a) that the Court would not now grant *oyer* of the writ; *Boats v. Edwards* (b), *Doug.* 228. and that if the plea were a nullity the Plaintiff might sign judgment. *Wagstaffe v. Long, Barnes*, 263. ed. 3. He also cited Sir *William Hick's* case, 1 *Vent.* 154.

Heywood Serjt. contra insisted, that if the plea were bad it ought to have been demurred to: that there was no authority in the books in which *oyer* of the writ had been craved in order to

(a) So in *Thebold's Digest*, lib. 10. cap. 2. f. 1. it is said "bonne ne puit dire items al Briefe devant oier eu del Briefe; pur que demandons oier del Briefe," and *Braeton lib. 5. cap. 17.* is there cited.

(b) See also *Rep. Gen. T. 19 Geo. 3. B.R.* to the same effect, and *Spalding v. Mure*, 6 *Term Rep.* 364. where the Court said "formerly a variance between the writ and declaration might have been taken advantage of by the Defendant's craving *oyer* of the writ; but the Court have laid down a rule that the Defendant shall not have *oyer* of the writ for the purpose of setting aside the proceedings." According to the report in *Douglas of Boats v. Edwards*, a case in the common pleas was much relied on, which case, as appears from the note, was *Ford v. Burnham, Barnes* 340. ed. 3. There Defendant having pleaded a tender *ante diem impetrat: brev: orig:* Plaintiff replied

an original before the tender; upon which Defendant prayed *oyer*, which was denied; and it was said, that "the Court never make rules for *oyer* of originals which are matters of record." It is to be remarked, however, that the Defendant in that case, by the regular course of pleading, instead of praying *oyer*, should have referred *ad test record*: and that in two subsequent cases, viz. *Vanderplank v. Banks*, C. B. 2 *Wif.* 85. and *Hole v. Finch*, 2 *Wif.* 293. the Court of *Common Pleas* held, that a variance between the writ and count cannot be taken advantage of without craving *oyer* of the writ; but in neither of these cases was it said, that if *oyer* had been craved, it would have been refused, though in the latter it was said, that in such a case the Master of the Rolls on application would order right originals to be made out.

plead

plead misnomer in abatement; and that this therefore was an experiment, for if the Plaintiff had demurred he could only have had a judgment of *respondeas ouster*. He urged that this was not a plea to the jurisdiction, but to the person, and that no plea to the person could be pleaded after *oyer*. *The loall's Dig.* l. 14. c. 5. and that a precedent of such a plea pleaded without *oyer* was to be found in *Aston's Entries* (a), 1 pl. 2.

Cur. adv. vult.

The judgment of the Court was this day delivered by

EYRE Ch. J. On looking into the record, it appears to us that the plea proceeds upon a mistake of the statement of the writ in the declaration: it supposes the writ to have been sued out against the Defendant by the name of *Francis*, whereas the plea alleges that his name is *Samuel*. But the writ as recited at the head of the declaration is not against *Francis*, but against *Samuel*; it is that *Samuel* was attached to answer; *Samuel* arrested indeed by the name of *Francis*; the arrest, however, is not the operation of the writ, but of the mesne process, which is out of the question after appearance. Now, taking it that the writ is recited to be a writ against *Samuel*, the plea only affirms the writ: taking the plea to amount to a denial that the writ was against *Samuel*, and an averment that it was against *Francis*, it is clear, (without entering into the question of *oyer*, and the learning on that subject,) that the Defendant must offer in some manner to make out the contents of the matter of record; this he has not done, mistaking, as we suppose, the import of the recital of the writ in the declaration. If it be said that the writ ought not to have been so recited, it may be answered, first, that is not now the question; and secondly, there is no reason why it should not be so recited; for the objection to the mesne process being cured by appearance in the true name, the writ, whenever it is properly called for, will be found to be a writ against the party by his true name. In the case of *Hole v. Finch*, the parties being probably aware how easily the mistake in the mesne process would be rectified upon the record after appearance, applied to set aside the mesne process for irregularity. The application before appearance would in all probability have been granted. But the Court refused to do it after appearance, and intimated that the mistake might be cured in the way which I have mentioned. The case, therefore, comes to this, that so long

(a) *Vid. etiam Roffall's Entr.* fo. 107. was grounded on a misnomer in the writ, *Herne's Pleader*, 1. and 1 *Wentworth's Syll.* the court seemed to think that *oyer* should be *Plead.* 3. 38. 47. However, in *Hole v. Finch*, 2 *Wilf.* 293. where the objection

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as it is the practice of the Court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after appearance of a misnomer in the mesne process. If, indeed, the Plaintiff carry the same mistake into the declaration, the plea of misnomer will still be open to the Defendant, for then both the writ and the declaration will appear upon the record to be against the Defendant by a different name from that which the plea states to be the name of baptism, and so the plea will be an answer to the writ and declaration. Here, as I have observed, it says no more than the writ and declaration have said; it is not an exception to, but an affirmation of the Plaintiff's proceedings as they appear upon the record. The plea, therefore, being bad and wholly unavailing, we think the judgment was properly signed; but as the case is involved in some perplexity, it may be right to let the party in to plead upon proper terms.

On a subsequent day, however, the rule was discharged without costs.

F. & G. 13th.
5 T.R. 491. 494.
13 *Eas.*, 513.
Espin. N.P.C.
66. 520. S.C.
3 *Bro. C.C.* 31.
2 *Campb. N.P.S.*
3 *Campb.* 303.

If *A.* deposit bills indorsed in blank with *B.* his banker, to be received when due, and the latter raise money upon them by pledging them with *C.* another banker, and afterwards become bankrupt; *A.* cannot maintain trover against *C.* for the bills.

COLLINS v. MARTIN and Others.

THIS was an action of trover for two bills of exchange deposited with the Defendants under the following circumstances: The bills were sent by the Plaintiffs to Messrs. *Nightingales*, his bankers, indorsed in blank, in order to be received by them when due, and to be carried to his account. In the bankers' book they were entered short: and the balance of account between the bankers and the Plaintiff was in favour of the latter. The *Nightingales* being in want of money deposited the bills in question, among others, with the Defendants, who were also bankers; and gave them an acknowledgment in writing for a sum of money received upon this deposit. The *Nightingales* having failed, this action was brought to recover the bills. *Eyc Ch. J.* before whom the cause was tried at the *Guildhall* sitting after *Michaelmas Term* 1796, finding upon enquiry that there was no evidence to shew that the Defendants knew the circumstances under which the bills came into the hands of the *Nightingales*, or the situation of the account between them and the Plaintiff, directed a nonsuit. To set aside this nonsuit, a rule nisi having been obtained upon a former day;

Le Blanc and *Palmer* Serjts. in the course of the Term shewed cause. This case may be decided without breaking in upon the doctrine of pledges, or denying that bankers are in some respects factors.

factors. The fallacy upon which the motion to set aside the non-suit proceeds is this; that bankers are to be taken absolutely as factors in every case. To that extent, however, the cases have not gone; though, where a question has arisen between the assignees of a banker who has failed and his customer, the Courts have compared the banker to a factor; as in *Zinck v. Walker*, 2 Bl. 1154. The analogy does not hold between bills and goods, for the possession of goods does not vest the property, since the transferee's title can never be better than the transferor's. But with respect to bills the whole property in them passes by indorsement; and it is immaterial to the person who takes a bill with a blank indorsement, whether the title of him from whom he takes it be good or not. This distinction has been acknowledged even in cases where the title to a bill has been derived to the holder from persons who obtained it by finding or theft. *Grant v. Vaughan*, 3 Burr. 1516. and *Miller v. Race*, 1 Burr. 452. It makes no difference whether the conveyance of these bills was absolute, or whether it was only *sub modo* as to the time or conditions under which they were to be held. The Plaintiff having parted with the whole property in the bills, and put them into the hands of the *Nightingales* like a marked guinea or a bank-note, the only question is, Whether the Defendants, when they received them from the *Nightingales*, paid a valuable consideration for them? That indeed is not denied; but the exception taken is to the mode of transfer. In fact, the Defendant discounted the bills for a part of the time which they had to run, the *Nightingales* reserving to themselves the power of redemption. In the case of *Goldsmith and Another v. Gaden and Another* in Chancery, 13th June 1796, the Plaintiffs, who were brokers, advanced money on three navy bills and a deposit of scrip; and though it afterwards appeared that both navy bills and scrip were left by the Defendants in the hands of the party depositing, for a particular purpose, and were not his property, but the property of the Defendants, yet on a bill filed in equity, it was referred to the Master to take an account of what was due to the Plaintiffs, and an issue at law was refused by the Chancellor, who thought the question too clear to be disputed. Now as navy bills pass by an indorsement in blank, and are not filled up till the holder comes for the money, they may be compared to bills of exchange indorsed in blank by the payee. The only question which has ever arisen in cases of this kind has been, Whether the holder came honestly by the bills? As in *Hinton's Case*, 2 Shower, 235. & *Crawley v. Crowther*,

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v. Crowther, 2 *Freem.* 257. both cited by Lord *Mansfield*, in *Grant v. Vaughan*, 3 *Burr.* 1524. and *Peacock v. Rhodes*, *Doug.* 633.

Shepherd and *Heywood* Serjts. in support of the rule. It may be admitted, that there is a distinction between goods and bills, though not to the extent contended for. Generally speaking, the property in goods sold does not pass by the sale, where the vendor is not entitled to sell; but if they be sold in market-overt, it does, because the sale is in the ordinary course of trade. So the property in these bills did not pass to the Defendants, because they were not negotiated in the ordinary course, and therefore they are subject to the same restriction as goods. It is true that the *Nightingales* themselves gained such a property in these bills as would have enabled them by transfer to convey the absolute property to a third person: but they were not entitled to deposit them with a third person by way of pledge. If the factor, who has a lien upon goods or bills of his principal, cannot transfer that lien to another, *Daubigny v. Duval*, 5 *Term Rep.* 604. much less can he who has no lien, as in this case, create a lien in his transferee. The use which was made of these bills was clearly a fraud in the *Nightingales*, to whom they were remitted for safe custody, and were by them entered short in their books. An attempt has been made to liken bills of exchange to navy bills; but in *Madish v. Ekins, Sayer*, 73. it was held, that a navy bill would not pass without an assignment. The negotiability of any instrument depends on the nature of the instrument. Now, it is the nature of a navy bill to be passed without any indorsement, and therefore it is the usual course to pledge them. In *Ford v. Hopkins*, 1 *Salk.* 283. where lottery tickets had been lodged with a banker that he might receive the money due on them, it was held that he could not exchange them. A bill indorsed in blank to a banker, is so indorsed, either to enable him to receive the amount, or to assign it absolutely: third persons know that a banker has these two powers, but they also know, that he has not the power to pledge. If, therefore, they take a bill from a banker indorsed in blank as a pledge, they take it at their peril, for the indorsement is not even *prima facie* evidence of a right to pledge.

Cur. adv. null.

The opinion of the Court was this day delivered by

EYRE Ch. J. We are all of opinion that this Plaintiff was properly nonsuited; and that there ought to be no new trial. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The Counsel for the Plaintiff admitted that

the bankers might have sold these bills, but it was argued that they could not pledge them; and the case of a factor pledging the property of his principal, was urged as an authority; for it was said, that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors or in the nature of factors; upon the same principle as in other cases, between holders of bills of exchange, and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *prima facie* consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between such an acceptor or drawer, and a third person holding the bill for value. And the rule is so strict, that it will be presumed, that he does hold for value until the contrary appears. The *onus probandi* lies on the Defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect that first holder. This all proceeds upon an *argumentum ad hominem*; it is saying, you have the title, but you shall not be heard in a Court of Justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all resemble factors; nor will the rule that factors cannot pledge, apply to the case of a banker pledging indorsed bills. That rule is grounded on the strict rule of property; the goods are not the factor's, and therefore he cannot pledge them. He may sell them, because, though they are not his, he is intrusted to sell them for his principal. He manages the sale, but it is his principal who through him sells them. For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell because the property has been entrusted to him,—and he

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may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they could be restrained from abusing their trust. But an arbitrary restriction cannot be imposed: any restriction would possibly check the facility of negotiation. As in cases of other property we say *caveat emptor*, so in this particular case we may say to the customer who prefers to entrust his banker with his bills and his cash, rather than to be at the trouble of doing his own business, *caveat*.

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8 Esp. 578.
15 Esp. 218.
3 B&F. 2^d Full.
364.
3 Esp. Cas. 51.
49.

Per Curiam,

Rule discharged.

WALWYN and Others v. ST. QUINTIN.

Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former; though the indorser have. If the holder after protest for non-payment and notice to the drawer, forbear to sue the acceptor, the drawer is not thereby discharged. So after protest only, if the drawer be not entitled to notice. *Sicca* before protest; or if the holder take security from the acceptor after protest. If the holder receive part-payment of the indorser, he may still recover the residue against the drawer; if not the whole.

ASSUMPSIT on a bill of exchange drawn by the Defendant on one *Deane*, by whom it was accepted, in favour of one *Thomas*, by whom it was indorsed to the Plaintiffs. At the trial before *Eyre Ch. J.* at the Westminster fittings after *Michaelmas Term* 1796, it appeared, that the bill was drawn to accommodate the indorser who had placed securities on which he wished to raise money in the hands of the acceptor, but that the drawer had no effects in his hands; that the bill not being paid when due, was protested, but no notice was given to the drawer of the non-payment till four days afterwards; that in *April* last, the Plaintiffs having threatened to proceed against the indorser and acceptor, the indorser paid 40*l.* 5*s.* to the Plaintiff's attorney, which the latter swore was upon account only, though the indorser himself gave in evidence (but was not believed) that it was paid upon a promise that no proceedings should be instituted against him; that the Plaintiffs having received a letter from *Mr. Anneley*, representing the probability of the acceptor's being able to pay at a future period, returned an answer in which they agreed not to press him; and that the drawer before the bill fell due having become insolvent and assigned over his effects to his creditors, quitted the usual place of his abode, and went to reside elsewhere. The jury having in answer to questions put by the Lord Chief Justice, found, first, that the bill was not a mere accommodation bill, the indorser having effects in the acceptor's hands; secondly, that the Defendant did not quit his place of abode with a view to abscond; and thirdly, that the 40*l.* 5*s.* were paid by the indorser upon account, not upon any agreement,

agreement,—proceeded under his Lordship's direction to give a verdict for the Defendant; but if the Court should be of opinion that the Plaintiffs were entitled to recover, then the verdict to be entered for them for so much of the bill as was unpaid. Accordingly a rule nisi having been obtained for that purpose,

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Clayton Serjt. shewed cause, and contended, first, That if any notice to the drawer of non-payment by the acceptor was necessary, the notice given in this case was too late and therefore insufficient, and that although it appeared that the drawer had no effects in the acceptor's hands, still as the indorser had, notice was not to be dispensed with; for that the ground on which it had been dispensed with where the drawer has no effects in the hands of the acceptor had been, that the transaction is fraudulent, there being nothing to represent the bill, *Bickerdike v. Bolman*, 1 Term Rep. 405.; and that although in this case the drawer had left his place of abode before the bill fell due, still notice should have been left at his last place of residence; secondly, That the holder having given time to the acceptor, had thereby discharged the Defendant, for even admitting notice in this case not to have been necessary, in order to shew that the note was not paid, yet it was necessary for the purpose of shewing that the holder looked to the Defendant for payment and meant to sue him, *Tindall v. Brown*, 1 Term Rep. 167.; thirdly, That the defendant was discharged by the Plaintiffs' receiving part-payment of the note from the indorser, *Kellock v. Robinson*, cor. *Eyre Ch. J. Guildhall*, 2 Str. 45. and *Tassel and Another v. Lewis*, cor. *Holt. Ch. J. N. P.* 1 *Ld. Raym.* 744.

Shepherd Serjt. in support of the rule insisted, first, That the ground on which it had been held necessary to give notice to the drawer of non-payment by the acceptor was, that the former might be able to withdraw those effects which he had placed with the acceptor to answer his acceptance, and that *Bickerdike v. Bolman* proceeded on this principle; that in this case, therefore, the drawer having no effects in the hands of the acceptor, no notice was necessary, nor if necessary could it have been given, the drawer having left his place of abode; secondly, that the Defendant was not discharged by the indulgence given to the acceptor, for that is only a discharge in cases where notice is necessary; where it is not necessary the drawer is not discharged but by an express renunciation on the part of the holder, of his right to sue him, *Dingwall v. Dunster*, Doug. 247. and *Black v. Peele*, cit. *ibid.*; that although those were cases of acceptors, yet that the drawer after notice,

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notice, or in a case where no notice is required, stands precisely in the same situation as the acceptor; thirdly, that the same principle might be applied to the objection of the Plaintiffs having received part-payment of the note from the indorser, for that in *Joyson v. Keyson*, Bull. N. P. 271. ed. 2. it was held, that the receipt of part of the money from the acceptor or indorser *without notice* to the drawer discharges him, but that *with notice* it does not; that here, therefore, where the drawer was entitled to no notice, a receipt of part-payment from the indorser would not discharge him.

Cur. ad. m.

The opinion of the Court was this day delivered by

12 Eg. 174.
15—218.

EYRE Ch. J. In this case we did very little more at ~~the~~ ^{the} ~~time~~ ^{time} than establish the matter of fact upon which the points of law were to arise. Many have arisen. This being an action against the drawer, the first point made relates to the want of notice being given to him of the acceptor's refusal to pay. The Plaintiffs insist that it was not necessary to give this notice for two reasons: first, because the drawer had no effects in the hands of the acceptor; and secondly, because before the bill became due he had left his place of abode, and the holder of the bill did not know where to find him. If the first reason is sufficient we need not go further. The jury have found that the acceptor had effects in account with the payee. But the true fact is, that this was the acceptor's bill, and not the drawer's. In a regular bill transaction the drawing by A. payable to B., or payable to A.'s own order, and indorsing the bill to B., is a mode by which the drawer pays a sum of money to his payee or indorsee through an acceptor. The transaction in this case, as far as it had pretensions to be deemed a real transaction, was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor. This is reversing the order of things. As far as concerns the drawer, it is what it has been called, a mere accommodation; and all consideration of effects of the drawer in the hands of the acceptor may be laid aside. It seems clear, that notice can be of no use to him; his situation being this, that if the acceptor does not pay he must, and may then and not till then resort to the acceptor to be re-imburfed: notice therefore can amount to nothing, for his situation cannot be changed. If there be any case in which notice should be dispensed with, surely it is this. Perhaps, indeed, it ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty; especially

as the grounds for dispensing with it are such as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice; for ninety-nine times in a hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with. But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands notice is not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions; and there may possibly be many others. Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and *a fortiori* for the acceptor, which is this case, it is fairly deducible from the cases which have been resolved, that notice need not be given. And this makes it unnecessary to inquire whether the drawer's absenting himself from his place of abode before the bill became due, will excuse the want of notice. The second point necessary to be considered is, whether the holder of the bill has discharged the drawer by forbearing to proceed against the acceptor on the application of Mr. *Annesley*. Had this forbearance taken place before noting and protesting for non-payment, so that the bill had not been demanded when due, it is clear that the drawer would have been discharged: it would have been giving a new credit to the acceptor; and the holder not having pursued the custom, this would have been deemed, as between the holder and the drawer, laches sufficient to discharge the drawer. But after protest for non-payment, and notice to the drawer, or what has been held equivalent to notice, a right to sue the drawer has attached, and the holder is not bound to sue the acceptor: he may therefore forbear to sue him. Is then the answer to Mr. *Annesley's* letter more than mere forbearance? If the holder enters into a new agreement with the acceptor for securing the payment of the bill, that may satisfy the bill as between him and the drawer, and may be considered as a new credit to the acceptor. There was in this case a treaty for such security, but it went off. Proposals for a security bind no one unless they can be made use of to impute laches; and after the protest no laches can be imputed.

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The last point is, that the holder having accepted 40*l.* 5*s.* from the payee on account of this bill, the drawer is thereby discharged. I do not recollect that this point was urged at *Nisi Prius*. It is supposed to be supported by the authority of very great names. In *Tassel & Lee v. Lewis*, 1 *Ld. Raym.* 743. the custom of merchants was stated by merchants in evidence as was then the course; and it was there agreed by *Holt Ch. J.* that if the indorsee of a bill accept but two-pence from the acceptor, he can never after resort to the drawer. *Kellock v. Robinson*, 2*St. 745.* was an action brought by the indorsee of a promissory note against the indorser: it appeared, that the Plaintiff after the indorsement had received part of the drawer of the note, and it was held to be a taking upon himself to give the whole credit to the drawer, and absolutely to discharge the indorser; so the Plaintiff was nonsuited. The rule in both cases is laid down in the most general terms without qualification or exception, and down to that time must have been considered as settled law. On the other hand, there is in Mr. Justice *Buller's Introduction to the Law relative to the Trials of Nisi Prius* (a), a note of the case of *Johnson v. Kenyon*, in this Court, Hil. 5 Geo. 3. which is probably Lord Bathurst's own note. In that note the rule is stated with this exception; "unless he give timely notice to the drawer that the bill is not paid: For," it is said, "where a man takes part of the money only, and does not apprise the drawer that the whole is not paid, he gives a new credit for the remainder. But where *timely notice* is given that the bill is not duly paid, the receiving part of the money from the acceptor or indorser will not discharge the drawer or other indorsers: for it is for their advantage that as much should be received from the others as may be." I will not say that this is not a reasonable qualification of the rule: but it requires some further investigation; and the rather as the want of notice recurs, and furnishes the appearance of an objection to the application of that case to the case now in judgment. That case supposes timely notice to have been given to the drawer that the bill is not paid. In our case we have got to the length of resolving that notice is dispensed with for one purpose, viz. to make the drawer answerable. Will it follow, that in respect of the consequence of receiving part of the money from the acceptor or indorser, according to the language of the case in Mr. Justice *Buller's* book, the notice shall also be dispensed with? This would be carrying that case a step further than the case itself goes; when, perhaps,

(a) *P. 271. ad. 3.*

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the reason why notice is necessary in the latter instance is not the same as in the former. Notice is required in the one to make the drawer responsible: it seems necessary in the other to prevent his being discharged from his responsibility. The effect of certain circumstances may be, that he may become responsible without notice: but being responsible, is not his responsibility to remain, or be discharged in the same manner as the responsibility of any other drawer who is made responsible by having notice? Giving a new credit to the acceptor would undoubtedly discharge a drawer made responsible without notice. Then is not the receiving a part of the money considered as giving a new credit? The note in the *Introduction to the Law of Bills of Exchange* (*a*) says, the indorser is discharged because "the indorsee has made his election to have his money from the "drawer." This is not very intelligible. In *Kellock v. Robinson* (*b*), the reason given is, that the holder takes upon himself to give the whole credit to the drawer. In one respect the two notes in *Lord Raymond* and *Strange* are imperfect; namely, that they do not state whether the money was received before, or at the time when the bill became payable, or whether after protest, and perhaps notice also, when the rights of the holder had attached. In the latter case possibly a payment in part might be received from one without prejudice to the right to proceed against another for what remains unpaid, upon the ground stated by Mr. J. Buller, that it is for the interest of all who are liable, that as much should be received as can be got. And doubtless receiving part is a different thing from taking a security for the whole. The party gives no credit in respect of what he actually receives, and as to what remains unpaid, he is in the same situation as he was in before. The fact sworn to by Thomas the indorser, in opposition to the Plaintiff's attorney, if it had been believed, would have saved the trouble of discussing this part of the case. He swore that it was agreed, that in consideration of 40*l.* 5*s.* to be paid, the holders would proceed no further on the bill. This must have discharged the drawer. But the attorney swore, and the jury found, that the money was received generally on account of the bill. We come now to a very material consideration. Of whom was the money received? The answer is, of the payee; that is, it was paid by an indorser to his indorsee, to whom he was responsible. But one indorser may pay the whole money due upon a bill to another indorser without satisfying the bills between him

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(*a*) *P. 273.* where *Kellock v. Robinson* is referred to. (*b*) As reported in *2 Str. 745.*

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and the acceptor and the drawer. It is every day's practice for a dishonoured bill to be thrown back upon the first indorser; each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser till it at last arrives at the first indorser. They may arrange the matter among themselves; and any one indorser may sue the acceptor or drawer instead of any of the preceding indorsers, striking out all the names upon the bill below his own. According to the very perplexed report of the case of *Johnson v. Kenyon*, in 2 *Wilf.* 262. (a), the first indorsee of a dishonoured bill for 1000*l.* after receiving 232*l.* from the payee who indorsed it to him, and getting back the bill from *Baldwyn* to whom he had indorsed it for value, and to whom he returned the money, recovered the whole 1000*l.* against the drawer; and on a motion for a new trial the verdict was confirmed: and very rightly. It was nothing to the drawer how the indorsers arranged the business among themselves. The point of notice supposed to be an ingredient in the case in Mr. Justice *Buller's* note did not arise. It was assumed that the drawer was liable. The question, as far as I can collect it, was, Whether the indorsee should recover the whole 1000*l.* against the drawer, having received 232*l.* upon the bill from the first indorser? which is exactly our case: and it was held that he should; that he might recover for the first indorser the 232*l.* which the latter had paid, and that the Defendant could have no reason to complain, for he only paid what he ought to pay. If the acceptor had paid any thing on account of the bill, it had been otherwise: so much of the bill would then have been satisfied, and at furthest the residue only could be recovered against the drawer (b). According to the two notes in *Ld. Raymond* and *Strange*, nothing could have been recovered in that case against the drawer. But they are very short notes; and possibly the rule may have been meant to be laid down only in respect of payment by acceptors when the bill is demanded. But whether that be so or not, they do not apply to this case; for they both speak of the holder receiving a part-payment of the acceptor of a bill, or of the drawer of a promissory note who is an acceptor: whereas the

(a) In *Bacon v. Scarles*, 1 *H. Bl.* 90. *Wilson J.* observes, that the case of *Johnson v. Kenyon* is inaccurately reported in 2 *Wilf.* and that he was disposed to think that the Chief Justice never said what he is there reported to have said.

(b) So *vice versa*, if part be received from the drawer, the residue only can be recovered against the acceptor. *Pierrepont v. Dunlop*, *Camp.* 571. and *Bacon v. Scarles*, 1 *H. Bl.* 88.

case now in judgment is a case where an indorser has accepted a part of the bill from his indorsee, which in reason and justice, and according to the constant course of business, and upon the authority of the case of *Johnson v. Kenyon*, will not prevent the whole bill from being recovered against the drawer.

The verdict is therefore to be entered for the Plaintiff, who as he is certainly not connected with the first indorser, will of course be content with the balance due to him.

Per Curiam,

Postea to the Plaintiff.

Engliss v. Darley, 2 Vol. p. 61.

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Mr. Justice BULLER was absent the whole of this Term from indisposition.

END OF HILARY TERM.

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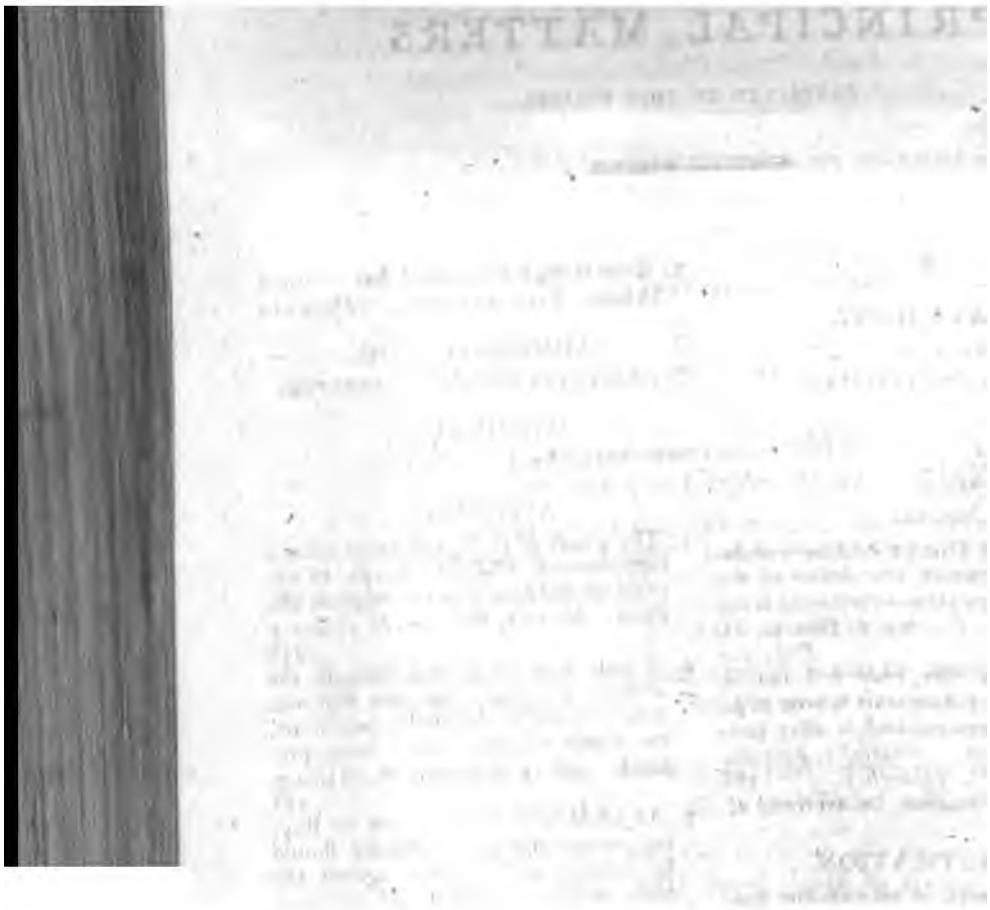
The Judgment of the Court in this case (*ante* 250.) was affirmed by the Court of King's Bench. (See 8 *Term Rep.* 112.)

CLIFTON v. GERRARD.

The Judgment of the Court in this case (*ante* 522.) was reversed by the Court of King's Bench. (See 7 *Term Rep.* 676.)

GOODTITLE on the several demises of HOLFORD, JERVOISE, and CAVE, Bart. v. OTWAY.

The Judgment of the Court in this case (*ante* 576.) was affirmed by the Court of King's Bench. (See 7 *Term Rep.* 399.)



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- 17 Geo. 3. c. 26. s. 1. *ex parte Ansell and Another*, T. 37 Geo. 3. Page 62
2. If any part of the consideration of an annuity be paid in *country bank notes*, the dates and times of payment must be set out in the memorial under 17 Geo. 3. c. 26. *Morris v. Wall*, H. 38 Geo. 3. 208
3. An annuity memorial, stating that the consideration money was paid to *A. B.* and *C.* "some or one of them," is bad: though it appear that the money was paid on the day on which the deed was executed by them all. *Vaux v. Ansell*, E. 38 Geo. 3. 224
4. If several persons who have purchased annuities of *A.* agree to give up those annuities on receiving a certain sum of money, and a bond payable at a future day, they retaining their annuity securities till the bond becomes payable, the Court cannot under 17 Geo. 3. c. 26. order any of the securities so retained to be delivered up though they may be void. *Sir Harry Goring, Bart. v. Welles, Clerk*, E. 39 Geo. 3. 395
5. At least not unless the creditors attempt to set them up again as annuity securities on non-payment of the stipulated sum, or the bond proving bad. *ib.*
6. *Semb.* That after payment of the money and delivery of the bond to the creditors, their debt is satisfied, whether the bond prove good or bad. *ib.*
7. If a bond and warrant of attorney given to secure an annuity, be no otherwise noticed in the memorial than by way of recital in the annuity deed which is set out, it is not a sufficient compliance with 17 Geo. 3. c. 26. *Van Braam v. Isaacs*, T. 39 Geo. 3. 451
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9. The Court cannot order an annuity bond to be delivered up to be cancelled for want of a memorial, pursuant to 17 Geo. 3. c. 26. though it be void by the first section of that act. *Symonds et Ux. v. Cobourne*, E. 36 G. 3. 482
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2. It is no ground for setting aside an award that one of the Defendant's witnesses was re-examined by the arbitrator after the evidence was closed on both sides, and the Plaintiff's attorney gone, though by a different testimony from what he gave at first the arbitrator's opinion were influenced. *Atkinson v. Abraham*, M. 38 Geo. 3. 175
3. Unless such re-examination appear to have been brought about by the management of the Defendant's attorney. *ib.*

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1. There is no fraud in the assignee of a term affixing over his interest to whom he pleases, with a view to get rid of the lease, although such person neither takes actual possession nor receives the lease. *Taylor v. Shum and Others*, E. 37 Geo. 3. 21

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Court, and such attachment may issue on the following day provided bail shall not then be perfected, or the Defendant rendered in discharge thereof. *Reg. Gen. Trin.* 38 Geo. 3. *Page* 312

2. An attachment for non-payment of a sum of money pursuant to an award, cannot issue before a personal demand has been made. *Brandon v. Brandon*, *E. 39 Geo. 3.* 394
3. Even though the time and place for the payment of the money be specified in the award. *ib.*
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1. The Court will not discharge an attorney on a common appearance, unless he shew that he has practised within the space of a year. *Dyson v. Birch, One, &c.* *E. 37 Geo. 3.* (*Vid. et Brooke v. Bryant*, *7 Term Rep. 25.*) 4
2. Qu. If he should not also state that he has had a certificate under 25 Geo. 3. c. 80. within that time? 5
3. Delivery of an attorney's bill is conclusive evidence on a taxation by the prothonotary against an increase of charge in a subsequent bill on any of the items contained in the first, and strong presumptive evidence against any additional items. *Lorridge v. Botham*, *E. 37 Geo. 3.* 49
4. One admitted an attorney of C. B. (unless an attorney of K. B. or Solicitor of Chancery or Exchequer) must file his articles of clerkship with the secondary, together with affidavits of execution, due service and notices. *Regula Generalis*, *T. 37 Geo. 3.* 90

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2. A Frenchwoman and her husband come over to England, the husband gives her a power of attorney to transact his business, and goes to Hamburg, she cohabits with another man, and trades on her own account with the Plaintiff by whom she is arrested: under these circumstances the Court will not discharge her on a common appearance on the ground of her coverture, although the Plaintiff appear to have been acquainted

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- acquainted with it. *De Gaillon v. V. H. L'Aigle*, E. 37 Geo. 3. *Page 8*
3. It is no objection to bail that they are indemnified. *Neat v. Allen*, E. 37 Geo. 3. *21*
 4. Where bail are opposed and rejected and the Defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward v. André*, E. 37 Geo. 3. *32*
 5. If the principal be surrendered within four days after the return of that writ, in which there is an effectual proceeding, it is sufficient. Thus, if bail be served with process on his recognizance, and die before the *quarto die post*, and fresh process issue against his executors, they have until the *quarto die post* of the second writ to surrender the principal. *Meadowscroft, One, &c. v. Sutton and Another*, T. 37 Geo. 3. *61*
 6. Bail are not permitted to justify who have been indemnified by the Defendant's attorney. *Reg. Gen. H.* 37 Geo. 3. *103*
 7. The Court rejected bail who had received a verbal promise of indemnity from the Defendant's attorney, but gave time to put in fresh bail. *Greenfill v. Hopley*, M. 38 Geo. 3. *103*
 8. Where bail in C.B. is taken under a judge's order, each of the bail is liable to double the sum ordered, as well as to double the sum sworn to, when taken by affidavit. *Dahl v. Johnson*, H. 38 Geo. 3. *205*
 9. The Court will not permit a Defendant to justify bail after an action for an escape commenced against the Sheriff, who has neglected to take a bail bond. *Webb v. Matthew*, E. 30 Geo. 3. *225*
 10. It is unnecessary to give bail in error on a judgment in debt, unless it appear that the action was brought on a specific contract. *Ablett v. Ellis*, E. 38 Geo. 3. *249*
 11. If a Defendant be arrested by process of K.B. and removed by *habeas corpus* to C.B. he may put in and justify bail in either Court. *Knowlys and Another v. Reading, Trin.* 38 Geo. 3. *311*
 12. Bail were allowed to justify after the rule on the Sheriff to bring in the body had expired, on payment of the costs of the opposition. *Weddall v. Berger*, M. 39 Geo. 3. *Page 325*
 13. If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *ib.*
 14. The Court allowed the Defendant to justify bail after an attachment had issued against the Sheriff, but gave leave to the Plaintiff to oppose them without prejudice. *Williams v. Waterfield*, M. 39 Geo. 3. *334*
 15. Where bail are regularly put in and excepted to, the Defendant need not describe them in his notice of justification. *England v. Kerwan*, M. 39 Geo. 3. *335*
 16. The Court will not discharge a Defendant on a common appearance on the ground of infancy. *Madoe v. Eden*, E. 36 Geo. 3. *480*
 17. A Defendant cannot enter into the recognizance of bail. *Reg. Gen. E. 36 Geo. 3.* *660*
 18. But each of his bail shall bind himself in double the sum sworn to. *ib.*

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1. If a Defendant surrender himself, it is a sufficient performance of the condition of the bail bond without putting in bail. *Maddocks and Another v. Bulcock*, M. 39 Geo. 3. *325*
2. But he must give notice of such surrender, *ib.* *ib.*
3. If bail be put in without any description, one of whom proves to be clerk to an attorney, and the other a person in a low situation, Plaintiff may take an assignment of the bail bond. *Fenton v. Ruggles*, M. 39 Geo. 3. *356*

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Page 132. n.

2. And a supplemental affidavit was refused. *ib.*

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1. If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them. *Fowler v. Down, E.* 37 Geo. 3. *(Vid. et. Webb. v. Fox, 7 Term Rep. 391.)* 44
2. If the furniture of a coffee-house be taken in execution by a creditor, and without being removed be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the affigees may seize it under the 21 Jac. 1. c. 19. s. 11. *Lingham v. Biggs and Another, T.* 37 Geo. 3. *Biggs and Another, T.* 37 Geo. 3. *82*
3. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself "the sale, order, and disposition," within the meaning of 21 Jac. 1. c. 19. s. 11. *87*
4. Possession of chattels with nothing to oppose it, is always evidence of ownership; but such evidence as may be opposed. *ib.* *88*
5. *A.*, a dyer, having purchased a plant of *B.*, and being unable to pay the

purchase-money, resold it to *B.*, who never took actual possession, but delivered it to him for three years; during that time *A.* became bankrupt, and the affigees having seized the plant in his possession under 21 Jac. 1., it was held a good defence to an action of trover brought against them by *B. Bryson v. Wyllie, H.* 24 Geo. 3. *B. R.* *Page 83. n.*

6. If any one of the creditors, though without the privity of the bankrupt, be induced by money to sign the certificate, it is void. *Holland v. Palmer, M.* 38 Geo. 3. *95*
7. If a Plaintiff become bankrupt after a nonsuit at *Nisi Prius*, and before the judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission. *Watts v. Hart, M.* 38 Geo. 3. *134*
8. It is no objection to a commission of bankruptcy that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt. *Menham, Affigee, &c. v. Edmondson, H.* 39 Geo. 3. *369*
9. If a creditor accompany the Sheriff's officer in levying an execution which is afterwards avoided by a commission of bankruptcy, trover may be maintained against the former by the affigee, though he has never received either the goods or their value from the Sheriff. *ib.* *it.*
10. The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt, and been chosen affigee under a commission of bankruptcy issued against the Defendant. *Hill v. Rees, E.* 39 Geo. 3. *421*
11. If a *f. fa.* issued against a bankrupt before certificate obtained be not executed till after, the Court will order the goods to be restored, even though he has not pleaded his certificate according to 5 Geo. 2. c. 30. s. 7. *Lifer, One, &c. v. Mundell, E.* 39 Geo. 3. *427*
12. For the Court will always give that relief in a summary way, which might be obtained by *audit& querela.* *ib.*
13. But

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13. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on the plea of bankruptcy. *Lister, One, &c. v. Munden*, E. 39 Geo. 3: Page 427

14. An action against a bankrupt who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 Geo. 2. c. 30. s. 37. is elapsed, if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees, that the bankrupt will be able to pay 15s. in the pound. *Jelfs v. Ballard*, T. 39 Geo. 3. 467

BANKRUPTCY, Plea of,
See PLEADING, No. 21, 22, 23.
PRACTICE, No. 3.

BARON AND FEME,

See BAIL, No. 1. POWER, No. 1.

1. Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery: held that the husband should be liable for necessaries furnished to her unless it appeared that the Plaintiff knew or ought to have known the circumstances under which she was living. *Norton v. Fazan*, E. 38 Geo. 3. 226

2. It seems that a woman living apart from her husband in a state of adultery, is liable on her own contracts, though she has no separate maintenance. *Cox v. Kitchin*, M. 39 Geo. 3. 338

3. If the husband reside abroad, and the wife trade and obtain credit in this country as a feme sole, she is liable for her own debts. *De Gaillon v. L'Aigle*, M. 39 Geo. 3. 357

BILL, Delivery of,
See ATTORNEY, No. 3.

BILL OF EXCEPTIONS,

1. A bill of exceptions being no part of the record in the Court below, is not to be included in the taxation of costs there. *Gardner v. Baillie*, E. 37 Geo. 3. Page 32

BILL OF LADING,

See CONSIGNMENT, No. 1.

BILL OF PARTICULARS,
See PRACTICE, No. 35.

BILLS OF EXCHANGE AND PRO-MISSORY NOTES,

See PARTNERS, No. 1, 2.
PLEADING, No. 25.

1. A note payable on demand with interest, drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose: after the indorsement, it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it, as the latter would want it when he settled accounts with A.; held that C. could not, after a settlement of accounts between A. and B. without a re-delivery of the note, recover on it against A. *Roberts and Others, Assignees, &c. v. Eden*, E. 39 Geo. 3. 398

2. For it was deposited as a pledge, and therefore subject to the same equity as if remaining in the hands of the original payee. *ib.* ib.

3. If A. deposit bills indorsed in blank with B. his banker, to be by him received when due, and the latter raise money upon the bills by pledging them with C. another banker, and afterwards become bankrupt; A. cannot maintain trover against C. for the bills. *Collins v. Martin*, H. 37 Geo. 3. 648

4. Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former; though the indorser have. *Walwyn v. St. Quentin*, H. 37 Geo. 3. 652

5. If

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5. If the holder, after protest for non-payment and notice to the drawer, forbear to sue the acceptor, the drawer is not thereby discharged. *Walwyn v. St. Quintin, H.* 37 Geo. 3. *Page 652*
6. So after protest only, if the drawer be not entitled to notice. *ib.* *ib.*
7. *Secus*, before protest, or if the holder take security from the acceptor after protest. *ib.*
8. If the holder accept part-payment of the indorser, he may still recover the residue against the drawer; if not the whole. *ib.* *ib.*

BISHOP,

See PROHIBITION, No. 1, 2, 3, 4.

BOND,

See CONDITION, No. 1, 2.

EXECUTORS and ADMINISTRATORS,
No. 4.

EVIDENCE, No. 5, 6.

ILLEGAL CONTRACT, No. 5.

PLEADING, No. 26, 27.

REPLEVIN, No. 2. 4.

1. The Court will stay proceedings on a single bond on payment by the obligor of principal and costs, without interest. *Hogan v. Page, M.* 39 Geo. 3. *337*
2. If the obligor of a bond after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the Court will set the plea aside. *Legh v. Legh, T.* 39 Geo. 3. *447*
3. Nor will they under these circumstances allow the obligor to plead payment of the bond. *ib.*

BRIBERY,

See TREATING ACT, No. 1.

BYE LAW,

See PLEADING, No. 13, 14.

C

CANAL ACT,

See COSTS, No. 7.

CERTIFICATE,

*See ATTORNEY, No. 2.
BANKRUPT, No. 6.*

CESTUY QUE TRUST,

See PLEADING, No. 5.

CLAIM,

See TOLL.

COGNIZANCE,

See REPLEVIN, No. 1, 2.

COMMON,

1. If the lord of the manor plant trees on a common, the commoner has no right to abate them, though there be not a sufficiency of common left: his remedy is by action. *Kirby v. Sadgrove, in Error, E.* 37 Geo. 3. *Page 13*
2. But if the lord so plant as to destroy the common, such an act would be considered as a nuisance, and the commoner might abate. *ib.*

COMMON RECOVERY,

1. It is no objection to the passing a common recovery that the order of the names of the vouchees in the *præcipe* at bar, varies from that in the *dedimus*. *Lang v. Woodhouse, E.* 37 Geo. 3. *31*
2. Nor that the warrants of attorney or the several vouchers are on separate pieces of parchment. *ib.*
3. The Court will give leave to amend a mistake in the writ of entry in a common recovery. *Cross v. Pead, M.* 38 Geo. 3. *137*
4. No common recovery or fine shall be suffered to pass unless the taking of the warrants of attorney be before one of the Justices or Barons of the Courts at *Westminster*, or one of the Serjeants at Law, unless an affidavit be filed stating that the commissioners taking the same, are, to the best of the Defendant's information and belief, either barristers of five years standing, or solicitors or attorneys of some of the Courts at *Westminster*, the Judges of the Court of Session and

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and Exchequer, or advocates and clerks to the signet of five years standing in Scotland. *Reg. Gen. M.* 39 Geo. 3. *Page* 362

COMPOSITION, Deed of,

1. The creditors of a bankrupt entered into a deed of composition to receive 8*s.* in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and join in a petition to the Chancellor to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered on some of the bills; held that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received. *Stock v. Mawson, Trin.* 38 G. 3. 286

CONDITION,
See PLEADING, No. 26, 27.

1. If the condition of a bond be to render a person in execution who has once been discharged, it is void. *Da Costa v. Davis, E.* 38 Geo. 3. 242
2. If a condition be to do one of two things, and one become impossible, it is no excuse for not performing the other. *ib.*

CONSIGNMENT,

1. *A.* of Liverpool, wishing to draw on the banking-house of *B.* in London to a large amount, agreed among other securities given to consign goods to a mercantile house, consisting of the same partners as the banking-house, though under the firm of *B.* and *C.*; accordingly he remitted the invoice of a cargo, and the bill of lading indorsed in blank to *B.* and *C.*; but the cargo was prevented from leaving Liverpool by an embargo; *A.* then became bankrupt, being considerably indebted to *B.*, and the cargo was delivered to his assignees by the captain: held that *B.* and *C.* might maintain trover for it against the latter. *Haire v. Smith in Error, M.* 37 Geo. 3. 563

CONTRACT,

*See EVIDENCE, No. 5.
ILLEGAL CONTRACT.*

COPYHOLD,

*See CUSTOM, No. 1.
PLEADING, No. 16.*

CORPORATION,

*See MISNOMER, No. 1, 2, 3.
PLEADING, No. 13.
TOLL.*

COSTS,

*See BAIL, No. 4.
BANKRUPT, No. 7.
BILL OF EXCEPTIONS.
PRACTICE, No. 7, 12.
REPLEVIN, No. 3.*

1. The general term *costs* in a rule of reference to arbitration does not include the costs of that reference. *Branley v. Tunstall, E.* 37 Geo. 3. *Page* 34
2. A pauper as such can never pay costs. *Rice v. Brown, E.* 37 Geo. 3. 39
3. *Sembler*, that he may receive them for the defaults of his opponent. *ib.* *ib.*
4. If he misbehaves himself the Court will dispauper him, and so make him liable to costs. *ib.* *ib.*
5. If an arbitrator award among other things that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of Court, and one party in order to get the award out of the hands of the arbitrator pay the whole, he may have an attachment against the other party if he refuse to pay his moiety. *Hicks v. Richardson, M.* 38 Geo. 3. 93
6. The Court will not stay proceedings till security is given for the costs in an action by a foreign seaman serving on board an English ship. *Jacobs v. Stevenson, M.* 38 G. 3. 96
7. A rent charged on the rates by a canal act, as a compensation for damage done to land, is not within the 11 Geo. 2. c. 19. s. 22. so as to entitle an avowant to double costs. *Leominster Canal Company v. Cowel and Another, H.* 38 Geo. 3. 213
8. Nor

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8. Nor is any rent charge. *Page 213*

9. The Court set aside a judgment and warrant of attorney, given to secure an annuity for a defect in the memorial without costs, because it was the case of an executor. *Dickenson, Executor, &c. v. Boyne, M.* 39 Geo. 3.

10. A. sued as executrix of B. on a policy effected by A. in his life time, in which he was jointly interested with C. and D. now living; A. being nonsuited, held that she was entitled to the privilege of an executrix to be exempt from costs. *Wilton, Executrix, v. Hamilton, T.* 39 Geo. 3. 445

COVENANT,

See PAYMENT, No. 1.

PARTY WALL, No. 2.

1. If a lease for ninety-nine years, determinable on three lives, be conveyed in trust for A. for life, and B. covenant to use his utmost endeavours as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life, in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing, he procure a renewal upon his own life. *Scudamore and Others v. Stratton and Others, T.* 39 Geo. 3. 445

2. Performance pleaded otherwise than in the terms of the covenant is bad even on general demurrer. *ib.* *ib.*

3. Under a covenant by a lessee of a coal-mine to pay a moiety of all such sums of money as the coals there raised *shall sell for at the pit's mouth*, the lessee was held liable to pay a moiety of the money, which the coals, though sold elsewhere, would have produced at the pit's mouth. *Clifton v. Gerrard, H.* 36 Geo. 3. (Reverified on error, 7 Term Rep. 676.) 522

COVERTURE,

See BAIL, No. 2.

BARON and FEME.

COURTS.

1. The Court will not refuse leave to enter a suggestion under the 22 Geo. 2. c. 47. on the ground that a Court of Conscience has no authority to try a question of bankruptcy. *Keay v. Rigg, E.* 37 Geo. 3. *Page 11*

2. A Defendant is not liable to be sued in the county court for a debt not arising within the county, though he be resident therein. And a suggestion applied for on the ground of residence was refused. *Smith v. O'Kelly, T.* 37 G. 3. 11

3. The jurisdiction of the Court of Conscience does not extend to contracts made on the high seas. *M'Callas v. Carr, E.* 38 Geo. 3. 223

4. The Court will not allow a suggestion for double costs under 23 Geo. 2. c. 33. where the original debt being above 40s. has by a balance of accounts been reduced below that sum. *ib.* 13

5. If an attorney sue as a common person, the Court will give the Defendant leave to plead that the cause of action arose within the jurisdiction of the Court of Requests, together with other matters. *Tagg v. Madan, H.* 37 Geo. 3. 619

CUSTOM,

See EVIDENCE, No. 8.

PLEADING, No. 16.

1. It seems that a custom for the hirer to assess a compensation in lieu of heriot to be paid by an in-coming copyholder on surrender or alienation is not good. *Parkin v. Radcliffe, T.* 38 Geo. 3. 223

D

DECLARATION,

See PRISONER, No. 4.

DEED,

*See COMPOSITION, Deed of, No. 1.
LEASE, No. 1.*

DE INJURIA, &c. Plea of

*See PLEADING, No. 9, 10, 11, 12.
DEVAS*

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DEVASTAVIT,

See EXECUTOR and ADMINISTRATOR,
No. 1.

DEVISE,

See WAY RIGHT of, No. 1.

1. Lands usually occupied with a house will not pass under a devise of "a messuage with the appurtenances," unless it clearly appear that the testator meant to extend the word "appurtenances," beyond its technical sense.
Buck d. Whalley v. Nurton, T. 37 Geo. 3.
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2. But if that do appear, they may pass.
ib. *57*
3. The word "appurtenances" will carry orchards. *ib.* *ib.*
4. A devised all his freehold and leasehold estates "to B. and the issue of her body as tenants in common, but in default of such issue, or being such if they should all die under twenty-one and without leaving issue" then over; held that all the limitations subsequent to that to *B.* being contingent, the remainders in the freehold were barred by fine and recovery, but that the leasehold vested in the remainder-man on the death of *B.* without issue. *Burnfall v. Davy and Others, H. 38 Geo. 3.* *215*
5. Testator devised "all his freehold leasehold, &c. estates" to *A.* in fee, provided that if *B.* shall have "any son or sons," then "to such male issue as *B.* shall have when *A.* attains twenty-one," but *A.* to have the rents and profits of the estates till he attains twenty-one: by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of to *A.* his heirs, &c. for ever." *B.* had one son who died before *A.* attained twenty-one, and a second who was born three weeks after that period. Held that the first son took nothing, but that the second took an estate in tail male. *Whitelocke, Administrator, &c. v. Heddon and Others, E. 38 Geo. 3.* *243*
6. Devise to the testator's seven sisters, share and share alike; on the death of

any of them her share to go to her first and other sons in tail, and for *default of such sons*, to her daughters as tenants in common; in case of any of the seven sisters dying without issue, or such issue dying under twenty-one, the surviving sisters to take her share, and if all the sisters should die without issue, or such issue die under twenty-one, then over; held that the words for "default of such sons," did not make the remainder to the daughters contingent, which took effect notwithstanding the birth of a son. *Doe d. Dacre v. Dacre, E. 38 G. 3.* (Affirmed on error in *K. B. 8 Term Rep. 112.*) *Page 250*

7. Testator devised in fee to *P. D.* his brother for life, and after his decease to *G. P.* his niece for life, then to trustees to preserve contingent remainders, and after the decease of *P. D.* and *G. P.* "in trust for the use of the first son of *G. P.* and his heirs, and for want of such issue to the other sons of his niece, and their heirs in succession, and for want of such issue male, then to the daughters of *G. P.* and for want of such issue over; held that the words for want of such issue male, made the remainder to the daughters contingent, and that it was therefore defeated by the birth of a son. *Keene d. Pinnock et ux. v. Dickson, B. R. M. 23 Geo. 3.* *254 n.*
8. Devise to *S. N.* son of *T.* and *M. N.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. N.* and their heirs male; for default of such issue to the use of the daughters of *T.* and *M. N.* and for default of such issue to the use of the right heirs of *T. N.* for ever; held that the word "such" referred to the daughters of *T.* and *M. N.* before-mentioned only, and restrained the limitation to them to an estate for life. *Denn d. Briddon et ux. v. Page and Another, B. R. M. 23 Geo. 3.* *261 n.*
9. *A.* after giving a life estate in certain copyholds to *B.*, devised as follows: "All the rest of my lands, tenements, and her-

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hereditaments, either freehold or copyhold, whatsoever and wheresoever, and also all my goods, &c. after payment of my just debts and funeral expences, I give, devise, and bequeath the same unto my wife S. C." held that under this devise S. C. took a fee. *Denn d. Mellor v. Moor in Error*, M. 37 Geo. 3.

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10. A. seized in fee of the manors of *Stanford*, &c. and also of the manors of *Swinford* and *South Kilworth*, entered into marriage articles to secure a jointure to his intended wife upon the above estates, and to make provision for younger children, and agreed to settle the *Stanford* estate upon his eldest son in strict settlement, subject to part of such jointure and provision. He then devised those estates in case he should happen to die without issue, and subject to such jointure as he might make, to the lessors of the Plaintiff for five hundred years upon the trusts therein expressed. Afterwards by separate deeds of lease and release, he conveyed, first, the *Stanford* estate, to trustees in fee, to the use of himself in fee till the marriage, with divers limitations in pursuance of the articles, and subject to a term of five hundred years for securing part of his wife's jointure to the use of himself in fee; secondly, the *Swinford* and *South Kilworth* estates to trustees in fee to the use of himself in fee till the marriage, to the use and intent that his intended wife should take the other part of her jointure thereout if she survived him, and after his death, remainder to trustees for five hundred years to secure such jointure, remainder to himself in fee. He afterwards married and died without issue. Held that the will was revoked as to both estates by the deeds of settlement, though they were consistent with the provisions of the will, and though the devisor took back the estate, he parted with by the same instruments. *Goodl d. Holford and Others v. Otway*, M. 37 Geo. 3. 576
11. Held also, that the latter estate was not excepted from this revocation by

the circumstance of the conveyance of that estate to the trustees being merely for the purpose of creating a term to secure the wife's jointure. *Goodl d. Holford and Others v. Otway*, M. 37 Geo. 3. Page 576

DISCONTINUANCE,

1. Affumpfit against three ; two pleaded a debt of record by way of set-off; the Plaintiff replied *non tali record*, and gave a day to the two Defendants, but entered no suggestion respecting the third ; held on demurrer, that the action being discontinued, judgment must be given against the Plaintiff, even though the Defendants' plea were bad. *Tippet and Others v. May and the Others*, E. 39 Geo. 3. 411

DISTRINGAS,

See PRACTICE, No. 4. 15.

1. If a *distringas* be returnable, on the last day of Term, the Plaintiff at the rising of the Court may move to increase issues on the *alias* or *pluris distringas* to be issued thereupon on the following day, in case no appearance shall then have been entered. *Reg Gen. Trin.* 38 Geo. 3. 311
2. So where issues have been levied on each *distringas*, he may at the rising of the Court, move for leave to tell the issues to pay the costs of the *distringas*. 16. 11

DISTURBANCE,

See MARKET, No. 1, 2.
TOLL.

E

EAST INDIA COMPANY,

See TRADE.

ILLEGAL CONTRACT, No. 5.

1. The exclusive right of trading to the *East Indies* granted to the *East India Company* by 9 & 10 Will. 3. has never been put an end to, and every infringement of it is a public wrong. *Canada and Others v. Anderson in Error*, E. 38 Geo. 3. 272
2. Though

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2. Though such parts of 9 & 10 Will. 3. as inflicted penalties, &c. were repealed by 33 Geo. 3. c. 52., and though the latter act says, that "no acts, or parts of acts thereby repealed, shall be pleaded or set up in bar of any action," &c. yet it is competent to underwriters who have subscribed policies on ships trading to the *East Indies* in contravention of 9 & 10 Will. 3. to avail themselves of the illegality of such trading, in an action brought on the policies. *Camden and Others v. Anderson in Error*, E. 38 Geo. 3.

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EAST INDIES,

See INDIA.

EJECTMENT,

See PRACTICE, No. 34. 36, 37.

If a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover such premises as the tenant is proved to be in possession of. *Fenn d. Blanchard v. Wood*, M. 37 Geo. 3. 573

ELECTIONS,

See TREATING ACT, No. 1.

ERROR,

See BAIL, No. 10.

EXCHEQUER CHAMBER, Court of.

ERROR, WRIT OF,

See NEW TRIAL, No. 1.

PRISONER, No. 2.

SUPERSEDEAS.

ESCAPE,

See BAIL, No. 9.

EVIDENCE, No. 3, 4. 9.

PLEADING, No. 19, 20.

1. If a sheriff's officer having taken a prisoner in execution permit him to go about with a follower of his before he take him to prison, it is an escape. *Benton v. Sutton*, E. 37 Geo. 3. 24
2. Qu. Whether it would not have been an escape also if the officer himself had accompanied him? *ib.* ib.

VOL. I.

EVIDENCE,

See EJECTMENT, No. 1.

INQUIRY, Writ of, No. 2.

NEW TRIAL, No. 3.

VARIANCE, No. 6.

1. Delivery of an attorney's bill is conclusive evidence, on a taxation by the prothonotary, against an increase of charge in a subsequent bill on any of the items contained in the first; and strong presumptive evidence against any additional items. *Loveridge v. Botham*, E. 37 Geo. 3. Page 49
2. In an action on an attorney's bill, the *Nisi Pris* roll is good *prima facie* evidence that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb v. Pritchett*, E. 38 Geo. 3. 263
3. In escape against the Sheriff if the Plaintiff aver in his declaration that J. S. was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. *Webb v. Herne and Another, Sheriff of Middlesex*, T. 38 Geo. 3. 281
4. Secus if the declaration only state that a writ was sued out, indorsed for bail. *Semb. ib.* 282
5. If the abandonment of a contract be made the ground of an action, it is not competent to the Plaintiff to shew that a contract has existed and been abandoned without proving the specific contract. *Walker v. Constable*, T. 38 Geo. 3. 306
6. In debt on bond, if one of the attesting witnesses be dead, and the other beyond the process of the Court, it is sufficient to prove the hand-writing of the witness that is dead. *Adam and Wife, Executrix v. Kerr*, M. 39 Geo. 3. 360
7. Qu. Whether evidence of a custom in Jamaica to execute bonds by substituting a mark with a pen for a seal, be admissible in support of a declaration on a bond sealed, &c.? *ib.* 360
8. Evidence that the homage have been accustomed to affix a certain sum of money as a heriot upon alienation, and that

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- that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation. *Parkin v. Radcliffe*, E. 39 Geo. 3. Page 393.
9. Evidence of a custom for the lord to have the best beast or good on the tenant's death, will not support a justification by him for taking the best beast. *Adderly v. Hart*, T. 4 Geo. 1. 394
10. To debt for an escape, Defendant pleaded a voluntary return and safe keeping since; Plaintiff in his replication admitted the voluntary return, but alleged that afterwards, and after notice of the escape, the prisoner escaped again: thus the Defendant traversed: Held, that it was not sufficient for the Plaintiff merely to prove a notice of escape and subsequent escape, but that he must also, in order to maintain the action, prove the first escape alleged in his declaration. *Griffiths v. Eyles*, E. Geo. 3. 418 n.
11. Evidence that the parishioners have treated with the proprietor of tithes for a composition is not alone sufficient to establish his possession of the tithes in an action on the 2 & 3 Ed. 6. c. 13. *Wyburd v. Tuck*, T. 39 Geo. 3. 458
- EXCHEQUER CHAMBER,
COURT OF.**
1. The Court of Exchequer Chamber will allow interest to a Defendant in Error under 3 H. 7. c. 10. on a judgment of *non pros*, as well as on a judgment of affirmance, *Sykes v. Harrison in Error*, E. 37 Geo. 3. 29
2. For the future the interest allowed will be *5l. per Cent.* instead of *4l. ib.* 30
3. Where judgment for the Defendant on a special verdict is reversed in the Exchequer chamber that Court on motion will give a final judgment for the Plaintiff. *Denn ex dem. Mellor v. Moore in Error*, E. 37 G. 3. ib.
- EXCISE,**
1. An excise officer seizing soap in the execution of his office at any distance from the sea, is within the protection of 24 Geo. 3. Sess. 2. c. 47. s. 15. *The King v. Brady and Others*, M. 38 Geo. 3. Page 187
2. Nor need he have a warrant to seize the soap *in transitu*, if liable to forfeiture. ii.
- EXECUTION,**
See PRISONER, No. 1, 2.
1. An attachment for non-payment of money is an execution. *The King v. Davis, One, &c.* M. 39 Geo. 3. 336
2. If a *fi. fa.* be *sealed* before Defendant's death, but delivered to the Sheriff and executed after, the execution is regular. *Waghorne v. Langmead*, M. 37 Geo. 3. (*Vid. et. Bragner v. Langmead*, 7 Term Rep. 20.) 571
3. Same point. *Gill v. Parsons*, 13 W. 3. B. R. (Same case, 7 Term Rep. 21. n.) 572
- EXECUTOR AND ADMINISTRATOR,**
See ADMINISTRATION, No. 1, 2.
- BAIL, No. 5.
- COSTS, No. 9, 10.
1. If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *Quick et ux. v. Sir Wm. Staines, Knt. Sheriff*, T. 38 Geo. 3. 293
2. An outstanding judgment against a testator or intestate not docketed according to the directions of the 4 & 5 Will. & Mary, c. 20. cannot be pleaded by an executor or administrator to an action on simple contract. *Steele v. Rorke, Administratrix*, T. 38 Geo. 3. 397
3. Qu. Whether an executor can maintain trespass for trees cut down in the life time of his testator? *Williams, Executor, v. Breedon, Mich.* 39 Geo. 3. 329
4. If the obligee in a joint and several bond make one of two obligors his executor with others, the action on the bond is discharged as to both obligors. *Cheetham v. Ward*, H. 37 Geo. 3. 630

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EXTINGUISHMENT,

See EXECUTORS and ADMINISTRATORS,

No. 4.

WAX, Right of, No. 1.

F

FACTOR,

See CONSIGNMENT.

BILLS OF EXCHANGE, No. 3.

PARTNERS, No. 1, 2.

FEME,

See BAIL, No. 2.

BARON and FEME.

POWER, No. 1.

FINE,

See COMMON RECOVERY, No. 4.

1. No fine which appears to have been acknowledged more than twelve months, can pass the King's silver office without a rule of Court or Judge's order, *Reg. Gen. E. 36 Geo. 3.* *Page 530*
2. In such case, if the confessors be living, an affidavit must be made thereof. *ib.* *ib.*
3. If dead, the affidavit must state the time of their death. *ib.* *ib.*
4. And the application for a rule or order that the fine may pass the King's silver office shall be made to the Court on motion if in Term time, if in vacation to a Judge at Chambers; and the rule or order must be filed with the *præcipe* and concord at the King's silver office. *ib.* *ib.*

FOREIGN LAWS.

If a Defendant be held to bail in this country on an instrument entered into in *France*, by which instrument his property only, and not his person was, according to the law of *France* made liable, the Court on motion will discharge him on his entering a common appearance. *Melan v. The Duke de Fitzjames, M. 38 Geo. 3.* *138*

FOREIGNER,

See Costs, No. 6.

FRAUD,

See ASSIGNMENT.

FRAUDS, STATUTE OF.

1. On a motion for a new trial by a Defendant in an action against him for goods delivered to the use of a third person on his undertaking to see the Plaintiff paid, the Court will take into consideration not only the expressions used, but the particular situation of the Defendant at the time of his undertaking, and the amount of the sum for which he will thereby be made liable. *Keate v. Temple, M. 38 Geo. 3.*

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2. A sale of lands, though by auction is within the statute of frauds, and therefore no action can be maintained upon it without a memorandum in writing. *Walker v. Constable, T. 38 Geo. 3.* *306*
3. If *A.* agree with *B.* to let him land rent free, on condition that *A.* shall have a moiety of the two succeeding crops, the agreement need not be in writing under the statute of frauds. *Semb. Poulter v. Kellingbeck, E. 39 Geo. 3.* *397*

FREIGHT.

1. A ship bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of landing in *Jamaica* by a *French* privateer, but was afterwards recaptured, and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: Held, that the owners of the ship were not entitled to any part of the freight. *Curling v. Long, H. 37 Geo. 3.* *634*
2. Though by the usage of the trade, the ship was loaded at the expence of the owners. *ib.* *ib.*
3. For freight commences from breaking ground, *ib.* *ib.*

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GUARANTY.

1. If *A.* become bound to *B.* for the honesty of *C.* who embezzles money, *xx 2* *B.* may

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- B.* may maintain an action on the guaranty, though three years have elapsed without any notice having been given of the embezzlement by *B.* *Peel v. Tatlock, E. 39 Geo. 3.* *Page 419*
2. At least if *A.* was acquainted with the circumstance from any other quarter, and *B.* does not appear to have concealed it from him industriously. *ib.*
3. *A.* will not be discharged from his guaranty, though *B.* appear to have given credit to *C.* to the amount of the sum embezzled. *ib.*

the purposes of prostitution, wit knowledge on the part of the Plaintiff of that fact, is a sufficient bar. *Crisp v. Churchill, E. 34 Geo. 3.*

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5. To debt on bond, Defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in *London* by Plaintiff to Defendant, to be by the latter shipped for *Offend.* and from thence re-shipped for the *East Indies.* and there trafficked with clandestinely held a sufficient bar to the action, the case being within the *7 Geo. 1. c. 22.* which avoids all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot v. Tenant, M. 37 Geo. 3.*

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HERIOT,

*See CUSTOM, No. 1.
EVIDENCE, No. 8, 9.*

HOLLAND,

See BAIL, No. 1.

I

ILLEGAL CONTRACT,

*See MONEY had and received.
TREATING ACT.*

1. If *A.* receive money of *B.* to the use of *C.* it may be recovered by *C.* in an action for money had and received, though the consideration on which *B.* paid it be illegal. *Farmer v. Russel and Another, T. 58 G. 3.* 296
2. Qd. Whether the case would be varied if *A.* were a party to the contract between *B.* and *C.*? *ib.*
3. Plaintiff was employed to wash clothes for the Defendant, who was a prostitute, knowing her to be such: Held, that the use, however immoral to which the clothes might be applied, could not bar Plaintiff of an action for work and labour. *Lloyd v. Johnscn, M. 39 Geo. 3.* 340
4. But to an action for the use and occupation of a lodging, proof that the lodging was let to the Defendant for

INDEBITATUS ASSUMPSIT.

See PLEADING, No. 18.

INDIA,

*See EAST INDIA COMPANY.
TRADE, No. 1, 2.*

6. captain of an *East India* country trader, contracts in *India* with *B.* for a crew according to the custom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *West Indies* and back again; whereupon part of the crew bring an action for wages due on the *West India* voyage: Held on motion for a *mandamus* to examine witnesses in the *East Indies*, that the cause of action did not arise in the *East Indies* within the *13th Geo. 3. c. 64. s. 44.* *Francis v. Gilmore, M. 38 Geo. 3.*

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INDICTMENT.

1. In an indictment on *37 Geo. 3. c. 70.* it is sufficient to charge an *endeavour* to seduce a soldier from his allegiance, and to incite him to mutiny, &c. without specifying the means employed. *The King v. Fuller, M. 38 Geo. 3.* 180
2. Under a charge that *A.* *endeavoured to incite*

PRINCIPAL MATTERS.

1. incite *B. being a soldier*, to mutiny, knowledge of *B.*'s being a soldier, is implied. *The King v. Fuller*, M. 38 Geo. 3. *Page 180*
3. And the word "advisedly," if used in such a case, is equivalent to *scienter*. *ib.* *ib.*
4. It seems that if one endeavour to comprise two separate offences, a count in an indictment charging that endeavour, may contain those two offences. *ib.* *ib.*

INFANT,

See BAIL, No. 16.
TRUSTEE, No. 1, 2.

INQUIRY, WRIT OF.

1. If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. *Jones v. Chune, One, &c.* H. 39 Geo. 3. *363*
2. At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the Defendant to controvert any thing but the amount of the sum in demand. *De Gaillon v. V. H. L'Aigle*, H. 39 Geo. 3. *368*

INSOLVENT,

See PRACTICE, No. 6.
PRISONER.

1. A prisoner in execution in an action in the Tholsley Court at Bristol, having been removed by *habeas corpus* to the Fleet, was discharged under the Lord's act, by the Court of Common Pleas. *Hopkins v. Morris*, M. 38 Geo. 3. *92*
2. If a prisoner brought up to be discharged under s. 16. of the Lord's act, deliver in a false schedule and be remanded, the Court will not, at the instance of a creditor, order him to be brought up a second time for the purpose of amending his schedule, and assigning over that property which he had before concealed. *Hutchins v. Heiketh*, M. 38 Geo. 3. *143*
3. Even though the prisoner consent. *ib.* *ib.*

4. A note for securing the weekly allowance to a prisoner under the Lord's act need not be stamped. *Bowring v. Edgar*, E. 38 Geo. 3. (*Vid. et. Tekell v. Cafsy*, 7 Term Rep. 670.) *Page 270*
5. Such a note cannot be signed by the creditor's attorney if his client be dead. *The King v. Davies, One, &c.* M. 39 Geo. 3. *336*
6. It is no objection to a prisoner being discharged under the Lord's act that his creditor is dead. *ib.* *ib.*
7. An attorney in custody on an attachment for not paying over money received by him in the course of a suit, may be discharged under the Lord's act. *ib.* *ib.*
8. The Court cannot, under the words of 37 Geo. 3. c. 8. s. 2. moderate the sum to be paid to a prisoner on his being remanded, but a note must be signed for the full sum directed by that act. *ib.* *ib.*
9. A prisoner who is taken in execution for more than 300*l.* and afterwards reduces his debt below that sum, is not entitled to be discharged under the Lord's act in the next Term after he has so reduced his debt, unless it be also the next Term after he was taken in execution. *Ex parte Hubbard*, E. 39 Geo. 3. *423*
10. The Court of Chancery having refused to discharge a prisoner in custody for not putting in an answer unless on payment of the fee, he applied to C. B. to be discharged under the insolvent act, 34 Geo. 3. c. 69. but was refused, his contempt not consisting in the non-payment of money. *Ex parte Benjamin Lawrence*, E. 36 Geo. 3. *477*

INSURANCE,

See EAST INDIA COMPANY, No. 2.

1. Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. *Webb v. Thompson*, E. 37 Geo. 3. *5*
2. In an insurance on a ship at and from Hull to Bilboa, warranted to depart from England with convoy, the voyages from Hull to Portsmouth, where

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- the meets with convoy, and from thence to Bilboe, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. *Ruthwell v. Cooke, M. 38 Geo. 3.* Page 172
3. Insurance on a voyage from C. to D., on a representation that the ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., from whence proceeded immediately to C. and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured. *Driscol v. Paffmore, M. 38 Geo. 3.* 200
4. Insurance on a voyage from A. to B., from B. to C. and from C. to A.; the voyage from A. to B. is performed, but that from B. to C. being unavoidably prevented, the ship returns to A.; from whence the captain writes to his broker in London, requesting him to obtain the opinion of the under-writers as to his proceeding directly to C. if the charterer should insist on it, and is answered by him that he thinks the policy at an end; at the instance of the charterer the captain does proceed to C. and on his return from thence to A. the ship is captured: Held, that the voyage insured was never abandoned. *Driscol v. Boril, M. 39 Geo. 3.* 313
5. A. being indebted to B. without any order from him, consigns goods to C. to be held for B. and indorses the bill of lading to C.: resolved, that B. has an insurable interest in the goods so consigned. *Hill and Another v. Secretan, M. 39 Geo. 3.* 315
6. A. having consigned a cargo to B. and drawn bills on him to the amount of it in favour of C. his general agent, sends these bills together with the bills of lading to C.; desiring him to transmit them to B. "that B. may have an opportunity of insuring;" he also draws a bill for 300l. on C. which is accepted; B. refuses to take to the cargo or accept the bills drawn on him; C. then effects a policy in his own name and informs A. thereof, who approves of his conduct; in an action by C. stating himself in the first count to be the agent of A. and averring interest in him, and in the second averring interest in himself: Held, first, that the policy was good within the 28 G. 3. c. 56.; *Wolff and Others v. Horncaſle, M. 39 G. 3.* Page 316
7. Secondly, that C. had an insurable interest to the amount of 300l. *ib.* ib.
8. If the name of the broker, effecting a policy of insurance, be inserted in the policy as agent generally, without saying for whom, it is a sufficient compliance with 28 Geo. 3. c. 56. *Bell and Others v. Gilson, M. 39 Geo. 3.* 345
9. So it is if his name be inserted in the policies, though not as agent. *De Vignier v. Swanson, B.R. M. 39 Geo. 3.* 346 n. 6
10. Goods the produce of Holland, purchased in that country during hostilities between Great Britain and Holland, by a British agent resident there, and shipped for British subjects, were insured by them in this country: Held, that this was a legal insurance. *Bell and Others v. Gilson, M. 39 Geo. 3.* 345
11. In a policy against fire from half a year to half a year, the assured agreed to pay the premium half yearly "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year, and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid: Held, that the insurers were not liable, though the assured tendered the premium before the end of fifteen days, but after the loss. *Tarleton v. Stanforth in Error, E. 36 Geo. 3.* 471

INTEREST OF MONEY,
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EXCHEQUER CHAMBER, Court of,
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1. The net sum received only without interest can be recovered in an action for money had and received. *Walker v. Constable*, *Trin.* 38 Geo. 3.

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INTEREST INSURABLE,
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LANDLORD AND TENANT,
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LEASE,
See ASSIGNMENT.
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1. Tenant for life leases premises for twenty-one years, and before the expiration of that term dies, the trustees of the remainder-man, then an infant, continue to receive the rent reserved, and he on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee, and in the covenant against incumbrances that lease is excepted;

the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgages for some time receive the rent reserved: held that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe d. Potter v. Archer*, *T.* 36 Geo. 3.

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LEATHER.

1. A condemnation by four out of the six triers of leather, appointed under *1 Jac. 1. c. 22.* (the whole number being met for the purpose of trying) must be considered as the condemnation of all six. *Grindley and Another v. Barker and Others*, *E.* 38 Geo. 3.

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LIBEL.

1. A letter written by Defendant to a third person calling Plaintiff "a villain," is actionable though unsupported by proof of special damage. *Bell v. Stone*, *M.* 39 Geo. 3. 331
2. An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual. *Carry v. Walter*, *E.* 36 Geo. 3. 523
3. Qu. Whether the matter of justification ought not to be pleaded? *ib.* 46.

LIMITATIONS, STATUTE OF,
See PRACTICE, No. 22.

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MALICIOUS PROSECUTION,
See ACTION on the CATE, No. 1, 2, 3.

MANDAMUS,
See INDIA CONTRACTS in No. 1.

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MARKET.

1. If the grantee of a market under letters patent from the crown suffer another to erect a market in his neighbourhood, and use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. *Holcroft v. Heel*, E. 39 Geo. 3. *Page 400*
2. Qu. Whether if no specific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in such case he can support any action for an injury to his market? *ib.* *ib.*

MASTER AND SERVANT,

See NUISANCE.

MISNOMER,

See BAIL-PIECE.

1. The Plaintiffs sue by the name of the mayor and burgesses of the *borough of Stafford*, and give in evidence a charter, by which they appear to have been incorporated by the name of the mayor and burgesses of the *borough of Stafford*, in the *county of Stafford*: this is not in bar. *Mayor and Burgesses of Stafford v. Bolton*, E. 37 Geo. 3. *40*
2. But might have been pleaded in abatement. *ib.* *ib.*
3. Though if the variance had been in matter of substance, instead of mere matter of addition, so that no such corporation as that mentioned in the declaration had appeared to have existed, it might have been in bar, *ib.* *44*
4. Defendant being arrested by the name of *F. H.*, put in bail by the name of *S. H.*; Plaintiff then declared thus: " *S. H.* arrested by the name of *F. H.* was attached to answer," &c. Defendant without craving *oyer* pleaded in abatement of the writ that his name was *S. H.*; Plaintiff having treated this plea as a nullity, and signed judgment accordingly, the Court refused to set it aside. *Murray v. Hubbard*, H. 37 Geo. 3. *645*

MONEY HAD AND RECEIVED,

*See COMPOSITION, Deed of, No. 1.
ILLEGAL CONTRACT.
INTEREST, No. 1.*

1. A broker who has received the amount of a loss from the insurers, to the use of the insured, on account of an insurance on *British* goods in an *Imperial* ship trading to the *East Indies*, in contravention of 7 G. 1. *§. 1. c. 21. s. 2.* and who has had no intimation from the insurers to retain, shall not be allowed to set up the illegality of the contract as a defence, in an action by the insured for money had and received. *Tenant v. Elliott*, E. 37 Geo. 3. *Page 3*

MUTINY,

See INDICTMENT, No. 1, 2, 3.

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NATURALIZATION,

See SUBJECT.

NEW TRIAL.

1. Defendant brought a writ of error on the first day of Term; obtained a rule nisi for a new trial on the second and justified bail in error before cause shewn; this was held to be no objection to his supporting the rule for a new trial, as a point of importance was depending which would have been shut out in the Court of Error. *Sir B. Hammell Knt. and Others v. Sir W. Yea, Bart.* M. 38 Geo. 3. *142.*
2. Where no point has been saved at the trial, the Court will not set aside a verdict on a question of law, the justice and conscience of the case be with it. *Cox v. Kitchin*, M. 39 Geo. 3. *338*
3. If the testimony of witnesses on which a verdict has proceeded be founded on, and derive its credit from particular circumstances, and those circumstances be afterwards clearly falsified by affidavit, the Court will grant a new trial. *Lister, One, &c. v. Mundell*, L. 39 Geo. 3. *427*

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NONSUIT,

JUDGMENT AS IN CASE OF,

See PRACTICE, No. 2. 38.

1. Judgment as in case of a nonsuit may be entered up against the Demandant in a writ of right. *Almgill et ux. v. Pierson and Others*, M. 38 Geo. 3.

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2. Nor will the Court relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings. *ib.*

NOTICE,

See BAIL, No. 13. 15.

BAIL BOND, No. 2.

BILLS OF EXCHANGE, No. 4, 5, 6.

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TITHES, No. 1.

NUISANCE.

1. having a house by the road side, contracted with *B.* to repair it for a stipulated sum, *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials: the servant of *D.* brought a quantity of lime to the house, and placed it in the road, by which the Plaintiff's carriage was overturned: held that *A.* was answerable for the damage sustained. *Bush v. Steinman*, E. 39 Geo. 3. 404

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OBLIGATION,

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PARDON,

See PLEADING, No. 15.

PARTITION.

1. The 8 & 9 Will. 3. c. 31. s. 1. which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear. *Dyer v. Bullock and others*, M. 39 Geo. 3.

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PARTNERS,

See CONSIGNMENT, No. 1.

1. *A. B. C.* and *D.* were partners in a banking-house at Liverpool, and *C.* and *D.* also carried on a separate mercantile concern in London: *J. S.* having accepted bills payable at the house of *C.* and *D.* employed *A. B. C.* and *D.* to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; *A. B. C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by *J. S.* were remitted by *A. B. C.* and *D.* to *C.* and *D.* upon the general account between the two houses, and before any of the acceptances of *J. S.* became due both houses failed, and *J. S.* was obliged to pay his own acceptances: held that the assignees of *C.* and *D.* were entitled to retain against *J. S.* the bills remitted to them by *A. B. C.* and *D.* *Bolton v. Puller*, T. 36 Geo. 3. 539
2. Held also, that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of *C.* and *D.*, though sent by *A. B. C.* and *D.* before that event, *ib.* ib.

PARTY WALLS.

1. If the lessee of a house at a rack-rent underlet it at an advanced rent, he is liable to contribute to the expences of a party-wall built under the 14 Geo. 3. c. 78. *Sangster v. Birkhead*, T. 38 G. 3. 393
2. Nor is the operation of the statute at all varied by any covenants to repair, entered into by the landlord and tenant. *Sangster v. Birkhead*, T. 38 G. 3. ib.

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PAUPER,

See Costs, No. 2, 3, 4.

PAYMENTS,

See ANNUITY, No. 6.

Bond, No. 3.

1. If *A.* tenant for life, subject to forfeiture, remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.*, *A.*'s executor, on shewing that he acquiesced under a false apprehension, may recover from *C.* the amount of rent erroneously paid to *B.* *Williams, Executor, &c. v. Bartholomew, M.* 39 Geo. 3. *Page* 326

PAYMENT OF MONEY INTO COURT,

See PRACTICE, No. 24.

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PENAL ACTION.

1. The Court will not give leave to compound in a penal action after verdict, unless the Defendant can shew circumstances which entitle him to such an indulgence. *Crowder v. Wagstaff, E.* 37 Geo. 3. *18*
2. In compounding a penal action on the post-horse act, which gives costs to the prosecutor, the Court will allow the prosecutor to receive the deficient duties (not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the crown. *North g.t. v. Smart, T.* 37 Geo. 3. *51*

PERJURY.

1. Qu. Whether any one giving his testimony under a commission issuing out of a court of law for the examination of witnesses in Scotland, could be convicted of perjury. *Calland v. Vaughan, H.* 38 Geo. 3. *210*

PLEADING,

See Costs, No. 5.

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VARIANCE, No. 6.

1. In debt for rent against a mesne affinee, the original lessor cannot reply *per fraudem* to a plea of assignment, where the Defendant derives no benefit from the premises. *Taylor v. Shum and Others, E.* 37 Geo. 3. *Page* 21
2. Qu. Whether the replication *per fraudem* can ever be good to such a plea? *ib.* *22*
3. If a declaration on a bail-bond conclude, "whereby an action hath accrued to the Plaintiff to demand and have of the *Principal* (instead of the bail) and that the *Principal* hath not paid, &c." it is bad on special demurrer. *Morgan v. Sargent, T.* 37 Geo. 3. *23*
4. If the replication to a plea in abatement of the writ begin "that the said declaration ought not to be quashed," but conclude properly, it is well enough, for such words may be rejected as surplusage. *Sabine v. E. Johnstone, T.* 37 Geo. 3. *24*
5. The reversion of lands demised to the Defendant for years is conveyed to *A* and *B.* and the heirs of *B.* in trust for *A.* and his heirs; *A.* declares singly on a covenant contained in the lease; and after setting out the above title ~~without averring the death of B.~~ states himself to be "thereby seised of the reversion in his demesne as of fee." This is bad upon demurrer. *Scott v. Godwin, T.* 37 Geo. 3. *25*
6. In actions on contracts, if all the parties having a right to sue, are not made co-plaintiffs, it is in bar. *ib.* *26*
7. *Semb. contrâ* in actions on torts. *ib.* *27*
8. But where all the proper parties are not made co-defendants, it is only in abatement. *ib.* *28*

9. The

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9. The plea *de injuriâ suâ propriâ absq. tali cauſâ* to a cognizance for rent in arrear is bad upon special demurrer. *Jones v. Kitchin*, T. 37 Geo. 3. Page 76
10. It is only to be received, where the defence set up is matter of excuse. *ib.* 80
11. Not where any right or interest is asserted. *ib.* ib.
12. Nor where the defence turns upon the plea of commandment; but the commandment must be answered. *ib.* ib.
13. The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens to the use of the master, wardens and company. *Feltmakers' Company v. Davis*, M. 38 Geo. 3. 98
14. The first count in a declaration in debt for a penalty under a by-law, set forth the charter empowering the company to make by-laws, the by-law made and the breach of it; the second count omitting the above particulars, stated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made, &c." and this count on special demurrer was held bad. *ib.* ib.
15. A pardon, if pleaded, must be averred to be under the great seal. *Bull v. Tit*, H. 38 Geo. 3. 199
16. If the lord set up a custom to have the best live or dead chattel as a heriot; *Qu.* if the tenant can modify that custom by pleading another, that the homage shall affect a compensation in lieu of the heriot? *Parkin v. Radcliffe*, T. 38 Geo. 3. 282
17. The omission of "And thereupon the said J. S. complains" in the beginning of a declaration of trespass on the case, is no cause of special demurrer. *Dobson v. Sir W. Hearne, Knt. and Another*, H. 39 Geo. 3. 366
18. *A.* agreed with *B.* to let him land, rent free, on condition that *A.* should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: *A.* declared in *indebitatus aſſumptio* for a moiety of the value of the crops sold to *B.* without stating the special agreement, and held that he might well do so, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it. *Poulter v. Killingbeck*, E. 39 Geo. 3. Page 397
19. To debt for an escape, Defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept; Plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; Defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication, as to a new affignment, a negligent escape, voluntary return and safe keeping since, in the same manner as in the plea; this latter part of the rejoinder was held bad on special demurrer. *Griffiths v. Eyles*, E. 39 Geo. 3. 413
20. A plea that if the prisoner escaped several times (without specifying them) he returned as often, is bad. *ib.* ib.
21. If bail plead the bankruptcy of their principal in their own discharge, they must plead it circumstantially, or it will be bad on special demurrer. *Donnelly v. Dunn*, T. 39 Geo. 3. 448
22. Or on general demurrer. *Beddome and Another v. Holbrook and Another*, T. 39 Geo. 3. 459 n. (b)
23. *Semb.* That it cannot be pleaded at all. *ib.* ib.
24. *A.* declared in case against *B.* for sinking his boat, and after averring a non-feasance in *B.* as the cause, stated him to have acted with *great force and violence* in accomplishing the injury; *A.* recovered, and on error brought because the action should have been trespass, not case, and because the two actions were mixed, the Court referred the

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VERDICT.

USURY, No. 3.

1. The Court will not put off a trial at the instance of the Defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay. *Saunders v. Pittman*, E. 37 Geo. 3. Page 33

2. The Court of C. B. will make the payment of costs for not proceeding to trial a term of discharging a rule in judgment, as in case of a non suit. *Jolliffe v. Morris*, E. 37 Geo. 3. 33

3. The Court will set aside a regular judgment on an affidavit of facts, though bankruptcy is intended to be pleaded. *Evans v. Gill*, T. 37 Gen. 33

4. It is in the discretion of the Court to put a Defendant under terms who moves to have the issues levied under several *distringas's* restored to him on his appearance according to 10 Geo. c. 50. J. 4. *Cazalet v. Dubois*, T. 37 Geo. 3. 31

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See BILLS OF EXCHANGE and PROMISSORY NOTES, No. 1, 2, 3.

PLEDGES,

See REPLEVIN, No. 1.

POLICY,

See INSURANCE.

POWER,

1. If an estate in fee be devised to a femme covert, with a power annexed to dispose of the estate without the control of her husband, such power is void, being inconsistent with the fee given in the first instance. *Goodhill v. Brigham*, H. 38 Geo. 3. 192

PRINCIPAL MATTERS.

5. The Court will not grant an attachment for non-performance of an award pending an action brought on the award; nor allow the Plaintiff to waive the action in order to apply for the attachment. *Badley v. Loveday, T. 37 Geo. 3.* Page 81
6. An order for the discharge of an insolvent under the Lord's act, s. 16, cannot be made by a Judge in Term time, though summonses were taken out in vacation, and the order only delayed till the beginning of Term by an irregularity in the affidavit. *Haskins v. Morris, M. 38 Geo. 3.* 92
7. The Court will give leave in the first instance to enter up judgment on a verdict reduced by an award. *Higginson v. Nesbitt, M. 37 Geo. 3.* 97
8. The Court will not order a bail-bond to be delivered up to be cancelled, because the place where the affidavit to hold to bail was sworn is not mentioned in the jurat. *Symmers v. Wason, M. 38 Geo. 3.* 105
9. A Defendant by perfecting bail above was held to waive all objections arising from the bank act, 37 Geo. 3. c. 45. to the sufficiency of the affidavit on which he was held to bail. *Chapman v. Snow, M. 38 G. 3.* 132
10. But length of time seems to be no such waiver. *Fenwick v. Hunt, M. 38 Geo. 3. B. R.* 133 n.
11. The Court will not allow a Defendant to strike out the entry of a judgment of *nolle prosequi* entered by the Plaintiff on one of the counts of the declaration after it has been demurred to. *Milliken v. Fox and Another, M. 38 G. 3.* 157
12. Nor will the Court in that stage of the proceedings determine a question of costs respecting such a count. *ib. ib.*
13. C. by virtue of an order from B. to receive all money due to him on a particular account, obtains three out of four instalments due from A. to B. on that account; these payments are afterwards questioned by B. who brings his action against A. for the whole sum, and at the same time C. demands the fourth instalment: An application to the Court by A. to stay proceedings in the action against him by B. on his paying the fourth instalment to such person as they should appoint, was refused. *Macdonald v. Paisley, M. 38 G. 3.* 161
14. If a party proceed against a Defendant by action and indictment for the same assault, the Court will not compel him to make his election. *Jones v. Clay, H. 38 G. 3.* 191
15. Defendant before the action commenced quitted the kingdom, leaving another in possession of his house and goods; Plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance; and held regular. *Sir William Staines, Knt. and Another v. Johannot, H. 31 Geo. 3.* 200
16. The Court will not, by putting off a trial or other indirect means, compel a party to consent to a commission for the examination of witnesses in Scotland. *Calliany v. Vaughan, H. 38 Geo. 3.* 210
17. Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another under-writer, the Court will not put off the trial to enable him to apply to a Court of Equity for a commission to examine witnesses in Scotland to the same facts which were given in evidence on the last trial. *ib. ib.*
18. At least if he has obtained time to plead on the usual terms. *ib. ib.*
19. It is not sufficient to stick up a notice of declaration in the office, if the Defendant's last place of abode be known; for it ought to be served there. *Hofken v. Culliford, H. 38 Geo. 3.* 214
20. To *assumpfit* on a bill of exchange, the Court will not allow a Defendant to plead the general issue, and that the bill was given on a stock-jobbing transaction contrary to 7 Geo. 2. & 8. *Shaw v. Everett, H. 38 Geo. 3.* 222
21. Not the general issue and alien enemy to a declaration on a policy of insurance. *Angerstein v. Vaughan, H. 38 Geo. 3.* ib. n. a.
22. The

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32. The Court will not restrain a Defendant from pleading the statute of limitations on setting aside a regular interlocutory judgment. *Maddock v. Holmes and Others*, E. 38 Geo. 3. *Page 228*
33. A Defendant must take advantage of an irregularity in the writ before appearance. *Fox and Another v. Money*, E. 38 Geo. 3. *250*
34. Payment of money into Court is an admission of a legal demand only. *Ribbens v. Crickett*, E. 38 Geo. 3. *264*
35. The Court will not make a rule on a Plaintiff who brings an action on a bond, to allow an officer of the stamp-duty to inspect the bond, because the Defendant suspects it to be forged. *Chetwynd v. Marnell, Executor, &c.* E. 38 Geo. 3. *271*
36. The Court will not allow a Plaintiff to sign judgment, because the Defendant refuses to pay for half the paper-books delivered to the Judges; this case being within the rule, H. 35 Geo. 3. *Fulham v. Bagshaw*, T. 38 Geo. 3. *292*
37. Plaintiff cannot sign judgment for want of a plea without demanding one, though Defendant has neglected to take the declaration out of the office. *White v. Dent*, M. 39 Geo. 3. *341*
38. Taking out a summons before a Judge to stay proceedings on the bail-bond is a waiver of any irregularity in the notice of declaration. *Davis, One, &c. Affignee of the Sheriff v. Owen and Another*, M. 39 Geo. 3. *342*
39. So taking any step in a cause is a waiver of any irregularity, *ib.* *344*
40. If a Defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment. *Pierson v. Goodwin*, M. 39 Geo. 3. *361*
41. If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. *Jones v. Chune, One, &c.* H. 39 Geo. 3. *363*
42. The Court of C. B. will not stay proceedings in an action on an attorney's bill brought subsequent to the order of a Judge of another Court for its taxation, but previous to that taxation having taken place. *Stevenson, One, &c. v. Watson and Others*, H. 39 Geo. 3. *Page 365*
33. Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. *Pel v. Brown*, H. 9 Geo. 3. *369*
34. Service of a declaration in ejectment on one of two tenants in possession is good service on both. *Doe ex dem. J. Bailey v. Roe*, H. 39 Geo. 3. *369*
35. A Defendant cannot demand a bill of particulars till after appearance. *Kitchen v. Blanchard*, H. 39 Geo. 3. *371*
36. The mere acknowledgment of the wife of the tenant in possession that she has received a declaration in ejectment, will not bind her husband. *Goodtitle ex dem. Read v. Badtitle*, H. 39 Geo. 3. *381*
37. Service of a declaration in ejectment on a person appointed by the Court of Chancery to manage an estate for an infant, is not sufficient. *Goodtitle ex dem. Roberts and Wife v. Badtitle*, H. 39 Geo. 3. *383*
38. The Defendant may rule the Plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same Term. *Peeters v. Throgmorton*, E. 39 Geo. 3. *387*
39. The Court will not on motion strike out a part of a plea which contains double matter. *Griffiths v. Egles*, L. 39 Geo. 3. *413*
40. The Court will not put off a trial on account of the absence of a material witness, if by his evidence the defense of slavery is intended to be established. *Robinson v. Smyth*, T. 39 Geo. 3. *454*
41. A replication taking issue on a plea of payment to debt on an annuity bond, must be signed by a Sergeant. *Ellis and Wife v. Govey*, T. 39 Geo. 3. *469*
42. In an order to enlarge the time for pleading, the first and last days are both reckoned inclusively. *French v. Jackson*, E. 36 Geo. 3. *479*

PRINCIPAL MATTERS.

43. If the damages given by a verdict be reduced by an award, under an order of *nisi prius*, which has been made a rule of Court, the party is entitled to have the post-delivered to him without any application to the Court. *Grimes v. Naij*, E. 36 Geo. 3. *Page 480*

partly before hostilities between the two countries, partly after, and shipped for *England* on board a neutral vessel ostensibly bound for *Gfend*, to be taken by a *British* privateer, they are lawful prize, though the ship will be restored. *Louisa Margaretha, Henslop*, 3d April 1781. *Page 349 n.*

PREMIUM,

See INSURANCE, No. 2.

PRISONER,

See INSOLVENT.

PRACTICE, No. 30.

WARRANT OF ATTORNEY, No. 1.

1. The Court will discharge a Defendant out of custody who is in execution at the suit of a Plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family on notice of a motion for the above purpose declines interfering. *Broughton v. Martin*, M. 38 Geo. 3. *176*
2. A prisoner after judgment against him, may, notwithstanding the allowance of a writ of error, be charged in execution, *Fisher v. M'Namara*, T. 38 Geo. 3. *292*
3. The Court has no power to discharge a Defendant out of execution on the ground of a commission of bankruptcy having been issued against him by the Plaintiff. *M'Master v. Kell*, T. 38 Geo. 3. *302*
4. A prisoner in custody on mesne process is supercedeable, unless a copy of the declaration be delivered before the end of the Term after the process is returnable. *Blyth v. Harrison*, T. 36 Geo. 3. *535*

PRISONER AT WAR,

See ALIEN ENEMY, No. 1.

PRIVILEGE,

See ATTORNEY, No. 1, 2.

PRIZE.

1. If goods, the produce of *Spain*, purchased for *British* subjects resident there, by a neutral agent resident in *Spain*,

PRIZE MONEY.

1. It seems that nothing but a power of attorney or a will complying with the provisions of 26 Geo. 3. c. 63. and 32 Geo. 3. c. 34. will warrant a payment to a third person of money due from the public to sailors or marines. *Macdonald v. Paisley*, M. 38 Geo. 3. *161*

PROCESS,

See AMENDMENT, No. 1, 2.

EXECUTION, No. 2. 3.

VARIANCE, No. 2, 3, 4, 5. 7.

1. If a *capias per continuance* be *teste'd* on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original bear *testis* before the cause of action accrued. *Davis, One, &c. Assignee of the Sheriff v. Owen and Another*, M. 39 Geo. 3. *343*

PROHIBITION.

1. The Court of Common Pleas has no power to issue an original writ of prohibition to restrain a Bishop from committing waste in the possessions of his see. *Jefferson v. The Bishop of Durham and Others*, M. 38 Geo. 3. *105*.
2. At least at the suit of an uninterested person. *ib.*
3. It seems that no Court of Common Law has that power. *ib.*
4. But it may be doubtful whether the Court of Chancery has not?

PROMISE.

1. If one person make a promise to another for the benefit of a third, that third person may maintain an action upon it. *Marchington v. Vernon and Others, G. H. Sitings*, T. 27 Geo. 3. *B. R.* *101 s.*

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No. 4.

RENT,

See PAYMENT, No. 1.

REPLEVIN.

1. The action on the case against the Sheriff for taking insufficient pledges in replevin, ought to be brought in the name of the person making cognizance where there is no avowant on the record. *Page v. Sir John Eamer Knt. and Another, H. 39 Geo. 3.* 378
2. A replevin bond may, under the 11 Geo. 2. c. 19. be assigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer and Others, Affinees, &c. v. Dudley and Others, E. 22 Geo. 3. B. R.* 381 n.
3. The Court will not stay proceedings in an action of replevin unless upon

payment of the rent in arrear, together with all costs, though the arrears were tendered before with costs up to that time. *Hopkins v. Shrole, H. 39 Geo. 3.* Page 382

4. The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court, but the plaint, if removed by *re. fa. lo.* into a superior court, must be prosecuted there with effect, and a return made if adjudged there. *Gwillin v. Holbrook, E. 39 Geo. 3.* 410

RIGHT, WRIT OF,

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1. The Court will not permit the *mjt* joined in a writ of right to be tried by a jury, instead of the grand assize, though both parties desire it. *Dalton v. Harvey, H. 38 Geo. 3.* 192

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1. The indorsements on the certificate of registry required by 7 & 8 Will. 3. c. 22. & 26. Geo. 3. c. 60. s. 16. need not be recited in the deed of assignment of a ship under s. 17. of the latter act. *Capadose v. Codnor, E. 36 Geo. 3.* 483

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1. If goods prohibited from being sold in this country by 11 & 13 Will. 3. c. 10. are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be relanded, they are liable to be seized, though no actual attempt to reland them has been made. <i>Wilson v. Saunders, E. 38 Geo. 3.</i>	2 & 3. c. 13. (Tithes) 458 3 & 4. c. 3. (Appropriement) 14
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See ANNUITY, No. 10.
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See PRACTICE, No. 28. 32.
REPLEVIN, No. 3.

SUBJECT.

1. A natural born subject of this country, admitted a citizen of the United States of America, either before or after the declaration of American independence may be considered a subject of the United States, so as to be entitled to any commercial privileges granted to the subjects of the United States by treaty. *Marryatt v. Wilson in Error*, E. 39 Geo. 3. *Page* 430
2. Even though the subjects of this country be prohibited from exercising those privileges. *ib.* *ib.*

SUGGESTION,

See COURTS, No. 1, 2. 4.

SUPERSEDEAS,

See PRACTICE, No. 30.
PRISONER, No. 2. 4.

1. A writ of error operates as a supersedeas from the time of the allowance, not from the time of service. *Gravell v. Simpson*, E. 36 Geo. 3. 478
2. Bail must therefore be put in within four days from the former period. 478

SURETY,

See GUARANTY.

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TENANTS,

See LANDLORD AND TENANT.

TENDER.

If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought. *Le Grew v. Cooke*, M. 39 Geo. 3. 332

TIME,

See GUARANTY, No. 1.
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Reason.

PRINCIPAL MATTERS.

Reasonable time is a question of law.
Sheibell v. Fairbain, E. 39 Geo. 3.
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TRADING ILLEGAL,
See ILLEGAL CONTRACT, No. 5.
INSURANCE, No. 10.
PRIZE, No. 1.

TITHES,

See EVIDENCE, No. 10.

1. If a composition for tithes be made by *A.* as proprietor, and he lease them to *B.* whose interest is afterwards put an end to by *A.* before any alteration is made in the composition, *A.* cannot determine it without six months notice. *Wyburd v. Tuck*, T. 39 Geo. 3. 458

2. If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on the 2 & 3 Ed. 6. c. 13. as the right to the tithe vested in *A.* immediately on severance. *ib. ib.*
3. Qu. Whether if one only of two joint tenants execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out? *Wyburd v. Tuck*, T. 39 G. 3. 458

TOLL,

See MARKET, No. 2.

If toll be merely claimed of the individual members of a corporation exempt from toll, an action will lie on the writ *de effendo quietum de Theolonio* in the name of the corporation. *The Mayor, &c. of London v. The Mayor, &c. of Lynn*, E. 36 Geo. 3. 487

TRADE,

See SUBJECT, No. 1, 2.

1. Under the treaty concluded in 1795 between this country and the United States of America, confirmed by 37 Geo. 3. c. 97. it is not necessary that the trade conceded to the Americans by the 13th article should be direct from America to the British settlements in the East Indies. *Marryat v. Wilson in Error*, E. 39 Geo. 3. 430
2. It may be carried on circuitously through any country in Europe, including Great Britain. *ib.* 430

TREATING ACT.

1. It being contrary to the 7 & 8 Will. 3. c. 4. for a candidate to furnish provisions to any voter, after the teste. of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request. *Ribbons v. Crickett*, E. 38 Geo. 3. Page 264

TREES,

See COMMON.

EXECUTORS and ADMINISTRATORS, No. 3.

TRESPASS,

See EXECUTORS and ADMINISTRATORS, No. 3.
PLEADING, No. 24.

TRIAL,

See PRACTICE, No. 1, 2, 16, 17, 18, 40.

TROVER,

See BANKRUPTCY, No. 1. 9.

TRUSTEE,

See PLEADING, No. 5. 8.

1. If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit. *Ex parte Grace*, H. 39 Geo. 3. 376
2. But if it do not prove beneficial, he must take it upon himself. *ib.* 376

V

VARIANCE,

See EVIDENCE.

MISNOMER, No. 1, 2, 3.

1. The Plaintiff, a sailor, declared for 52l. 10s. for run-money, and gave in evidence a note for 52l. 10s. for run-money, with an additional stipulation written

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- written after signature of the note, for a pint of rum per day, and it was held no variance. *Baptiste v. Cobbold*, E. 37 Geo. 3. *Page 7*
2. The Court will not set aside proceedings for irregularity where the Plaintiff sues out a *quare clavum regis* against two, and declares against one only. *Spencer v. Scott*, E. 37 Geo. 3. *19*
3. In cases of process not bailable, the writ may be against several Defendants, and the declaration against one only. *Stables and Another v. Ashley and Others*, E. 37 Geo. 3. *49*
4. In cases of bailable process it is otherwise. *ib.* *ib.*
5. Arrest by the name of "Wefton;" declaration *de bene esse* against "Waston," sued by the name of "Wefton," and held regular. *Symmers v. Watson*, M. 38 Geo. 3. *105*
6. Evidence of a house situate in the parish of M. will support an averment of a house at S.; S. being extra-parochial, and both places usually going by the name of S. *Burbige v. Jacques*, E. 38 Geo. 3. *225*
7. If a process be served in the name of one Plaintiff, and a declaration be delivered in the name of two, it is bad. *Rogers v. Jenkins*, H. 39 Geo. 3. *383*

VENDITIONI EXRONAS.

The Court refused to grant an attachment against the Sheriff, because he had returned to a writ of *venditioni exponas* that part of the goods levied remained in his hands for want of purchasers. *Leader v. Danvers*, M. 39 Geo. 3. *359*

VENUE.

1. In an action on a promissory note, the Court will not change the venue from London to the county where it was made, on the Defendant's stating that all his witnesses live there. *Evans v. Weaver*, E. 37 Geo. 3. *20*
2. But if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will. *ib.* *ib.*

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3. The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the Defendant's witnesses residing there, if from the pleadings it does not appear necessary to produce many witnesses from that county unless a question should be raised of which a fair trial cannot be expected there. *Wat v. David*, E. 39 Geo. 3. *Page 425*

VERDICT.

See NEW TRIAL.

PRACTICE, No. 43.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the Jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict entering it on that count, though evidence was given applicable to the bad count also. *Williams, Executor, &c. v. Breedon*, M. 39 Geo. 3. *329*

U

USURY.

1. A. being a banker in the country discounts bills at four months for B. and takes the whole interest for the time they have to run; B. on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash and part by bills in London, some at three, some at seven, and some at thirty days' sight: and held not to be an usurious transaction, so as to induce the Court to grant a new trial, since the surplus of interest taken by A. might be referable to the expences of remittance. *Sir B. Hammett, Knt. and Others v. Sir W. Yea, Bart.* M. 38 Geo. 3. *144*
2. Securis, if such mode of remittance had been made a term of the loan, *ib.* *ib.*
3. The Court set aside a warrant of attorney and judgment given to secure a loan which was sworn to be usurious in order to bring the question of usury before

PRINCIPAL MATTERS.

before a jury, but refused to order a bill of exchange to be delivered up which had been given to procure the Defendant's release out of execution on the judgment. *Edmondson v. Popkin*, E. 38 Geo. 3. Page 270

attorney. *Jeyes, One, &c. v. Booth*,
M. 38 Geo. 3. Page 97

WASTE,

See PROHIBITION, No. 1, 2, 3, 4.

WAVER,

See PRACTICE, No. 9, 10. 23. 28, 29.

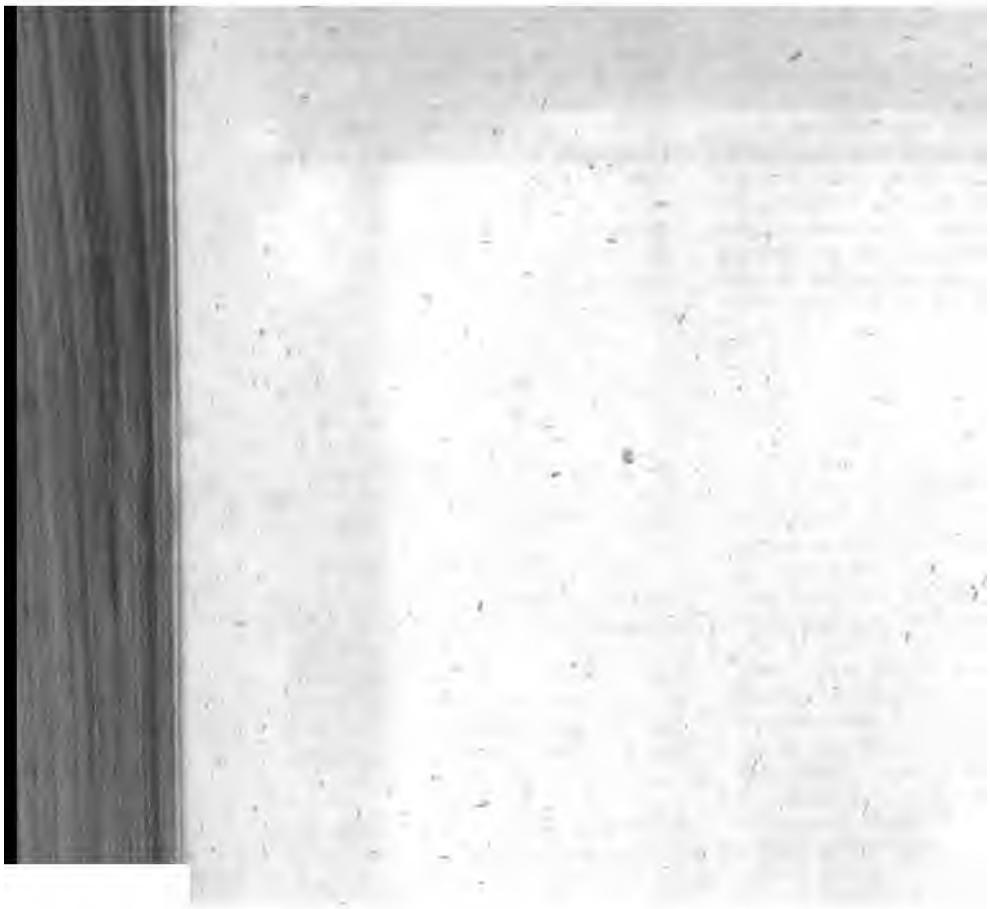
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WARRANT OF ATTORNEY,
See COMMON RECOVERY, No. 2. 4.
USURY, No. 3.

If a Defendant in custody being about to execute a warrant of attorney to confess judgment be informed that it must be done in the presence of an attorney on his part, and thereupon produce a person as such, in whose presence he executes the warrant of attorney, the Court will not set aside the proceedings thereon, because the person so produced by the Defendant was not an

One being seised in fee of the adjoining closes *A.* and *B.* over the former of which a way had immemorially been used to the latter, devised *B.* "with the appurtenances." held that, the devisee cannot under the word "ap-
" purtenances" claim a right of way over *A.* to *B.*, as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor. *Whalley v. Tompion and Another*, H. 39 Geo. 3. 371

THE END OF THE FIRST VOLUME.





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